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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. [redacted] 140

FITZGERALD MILLS CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on February 8, 1963.

Citations to Opinions Below

The Intermediate Report of the National Labor Relations Board's Trial Examiner is reported at 133 NLRB 893 and is printed in the record filed with this petition (R. 754-807). The decision and order of the National Labor Relations Board is reported at 133 NLRB 877 and

is printed in the record filed with this petition (R. 727-754) and in Appendix B hereto, *infra*, pp. 46-67. The majority and dissenting opinions of the Court of Appeals for the Second Circuit, printed in Appendix B hereto, *infra*, pp. 21-43, are reported in 313 F. 2d 260.

Jurisdiction

The Court of Appeals entered its decree on February 8, 1963 (R. 51; p. 44, *infra*). It denied rehearing on February 25, 1963. (R. 46). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

Questions Presented

1. Does a United States Court of Appeals exceed its reviewing powers under Sections 10(e) and (f) of the National Labor Relations Act, as amended, when, after rejecting the principal findings of fact on which the Labor Board expressly rested its inference of bad faith bargaining, the Court, instead of remanding, makes new findings of fact and, on the basis of those findings, assumes that the Board's ultimate conclusion would have been the same?

2. Does the National Labor Relations Act, as amended, permit basing an inference of bad faith bargaining on findings that the employer (a) had an uncompromising attitude with respect to the terms of a *reasonable* counterproposal, (b) created "possibilities" of delay, but caused no actual delays, by requiring its negotiators to obtain its approval before agreeing to any increase in the cost items of its proposal, (c) put its offered wage increase into effect without prejudice to future negotiations after the Union rejected it as too low and after the parties had reached an impasse, and (d) posted a truthful notice to its employees that attempted to place upon the Union "the onus for delay" in making its proposed wage increase effective?

Statement

This is a case of a Company, Petitioner herein, that had no history of anti-union activity, that for twelve years had operated under peaceably-negotiated collective bargaining agreements with the charging party and its predecessor, and that had no apparent reason for changing in 1959 the policy of good faith bargaining that it had followed all those years.

It is the case of a Company that, far from making no concessions or only token concessions in the 1959 negotiations, offered to the Union a full and complete contract that the Court below found provided "the basis for negotiations" and on which the parties did eventually reach "substantial agreement with the exception of the differing wage proposals and the Company refusal to agree to a check-off provision."

It is the case of a Company that had never paid a dividend on its common stock but that, nevertheless, instead of pleading "inability of pay," offered a substantial wage increase to its employees and did not propose to take away any of their fringe benefits.

The National Labor Relations Board, reversing its Trial Examiner, who recommended dismissing the complaint in its entirety, found that the Company had refused to bargain in good faith in violation of Section 8(a)(5) of the National Labor Relations Act, as amended, thereby provoking an unfair practice strike; that certain of its supervisors had made coercive statements to strikers in violation of Section 8(a)(1); and that, when the strike ended, it had violated Section 8(a)(3) by not reinstating strikers it had replaced and by insisting that those it did reinstate could not "bump" their replacements.

The Court of Appeals, with Moore, C. J., dissenting, rejected many of the Board's findings, but, on the basis of a new set of findings of its own, came to the same conclusions.

The following excerpt from the Trial Examiner's report summarizes the operative facts relevant to the questions that this Petition presents (R. 806-807):

> "Having carefully reviewed all evidence, and the entire record in the case, I am thereupon constrained to find and conclude that bargaining negotiations between the Union and the Respondent have been hard and long with respect to the terms and conditions of a new contract. The Union submitted contract proposals demanding wage increase of approximately 12 percent and other terms and conditions more favorable by far towards the employee organization than those existing under the old contract. The Respondent made written proposals offering wage increases of approximately 5 percent and union-security provisions considerably less than those contained in the old contract, omitting entirely the check-off of union dues from the wages of its employees. Thereupon, it became the strategy of the Union to force further concessions from the Respondent. When the impasse was reached on May 7, 1959, the Union called a strike to exercise economic pressure on Respondent, but failed to close down the plant. Respondent continued to meet at reasonable times with representatives of the Union and confer in good faith with respect to wages, hours, and other terms and conditions of employment in an effort to negotiate a new agreement. The Respondent was no more adamant in standing on its original proposals than the Union was in trying to enforce its increased demands for still higher wages and additional union-security provisions in the contract. Few concessions were granted by either party. The Act does not require Respondent to agree to proposals made by the Union or to make concessions with respect thereto so long as it bargains in good faith, as required by the Act. In finality, the Union terminated its strike and demanded full reinstatement for all strikers. Respondent rehired strikers without discrimination to fill existing job vacancies in the plant, but refused to displace permanent replacements hired during the strike. Except in that respect Respondent has not refused to continue negotiations with the Union in an effort to reach agreement on a new contract."

Sixteen months after receiving his recommendations, the Board completely reversed its Trial Examiner and, on the basis of the same operative facts, concluded that Petitioner had failed to bargain in good faith by (i) refusing to recede from a "predictably unacceptable" proposal, (ii) limiting its negotiators' authority to agreeing only to that "predictably unacceptable" proposal, (iii) committing a *per se* violation of Section 8(a)(5) by granting before an impasse was reached (not after, as the Trial Examiner found) a general wage increase the Union had rejected, and making two other "unilateral" changes in wages and working conditions, (iv) posting three notices implying that it did not intend to permit the collective bargaining process to alter its predetermined position on wages, and (v) being dilatory in supplying wage rates, job descriptions, insurance information and a seniority roster.[1]

If substantial evidence had supported the holding of the Board, Petitioner would not have challenged its validity in the Court below. But Petitioner vigorously contended, and was completely successful in showing in the Court below, that no substantial evidence supported the findings from which the Board inferred bad faith.

The Court of Appeals expressly agreed with Petitioner that its proposal was *not* "predictably unacceptable," that its negotiators' authority was *not* limited to accepting only a "predictably unacceptable" proposal, that Petitioner did *not* grant a general wage increase *before* reaching an impasse in wage negotiations, that the other "unilateral" acts were *not* evidence of bad faith, that two notices to employees that the Petitioner posted and that the Board condemned were *not* "material" and, by necessary implication, that the third

[1] The Board also relied on (vi) a post-strike statement of Petitioner's General Manager that the Court of Appeals properly ignored, and (vii) Petitioner's *per se* violation of 8(a)(5) with respect to the reinstatement of strikers, which, in turn, depends upon the Board's determination that Petitioner had bargained in bad faith.

notice did *not* display a disregard for "the collective bargaining process," and that Petitioner did *not* delay in supplying insurance information and a seniority roster.[2]

Nevertheless, the majority of the Court proceeded to hold that "in the light of the earlier failure to furnish information,"[3] the record supported an inference of bad faith bargaining because

(1) although "there was bargaining," Petitioner displayed an "uncompromising attitude" before the strike when it "narrowly limited" the bargaining to the terms of its *reasonable* counterproposal,

(2) created "possibilities of delay" by not giving its negotiators plenary authority to agree on cost items without first consulting their principal,

(3) put into effect without prejudice to further negotiations, on the day the Union commenced its strike and *when the parties had reached an impasse*, the same wage increase that the Union had rejected, and

(4) posted a truthful notice to employees, blaming the "delay in making effective the proposed wage increase" on the Union's rejecting the Company's offer.

In resting its decision on these grounds, the Court of Appeals not only usurped the Board's fact-finding function, but, while doing so, drew inferences of bad faith from circumstances that this Court and courts of appeal for other circuits have held not to be evidence of bad faith.

The result of all this is that, although the Petitioner satisfied the Court below that no substantial evidence supported the findings on which the Board rested *its* inference

[2] The Court found, however, there was substantial evidence of delay in supplying some of the requested wage rates and in preparing admittedly non-existent job descriptions.

[3] The only information that the Company "failed" to furnish consisted of some job descriptions that had never been prepared and were therefore not in the Company's possession.

of bad faith, the Petitioner was had no opportunity to litigate the findings on which the Court rested *its* inference. And in view of this Court's refusal to review the substantiality of evidence [*N. L. R. B. v. Pittsburgh Steamship Co.*, 340 U. S. 498, 503 (1951)], the Petitioner will have no opportunity to litigate the Court's new findings, and show that they, too, are unsupported by evidence, unless this Court directs the Court below to remand this case to the Board.

A direct comparison of the findings on which the Board based *its* inference of bad faith and the findings on which the Court below rested *its* inference shows clearly the contrast between them.

1. *Petitioner's Counterproposal and Bargaining Technique.*

The principal ground on which the Board relied in inferring bad faith was its finding that Petitioner had made a "predictably unacceptable" counterproposal and then had adamantly refused to recede from that counterproposal (R. 730-731, *infra*, pp. 49-51). The Court of Appeals rejected the Board's basic finding, saying (p. 26, *infra*):

> "* * * At the outset, we wish to make clear that the terms of the Company contract lend no support to this finding in our view. * * * Since the Company's contract here did provide the basis for future negotiations, it is apparent that the extreme situation illustrated in *NLRB v. Reed & Prince Mfg. Co.*, 205 F. 2d 131 (1 Cir. 1953), cert. denied 346 U. S. 887 (1953), is not presented. Indeed, if either contract can be said to have been 'predictably unacceptable' it might well be the Union's, which contained some unusual demands; * * *"

and (p. 28, *infra*):

> "In the case at bar, there was bargaining narrowly limited by the Company before the strike and somewhat more freely entered into thereafter * * *."

The Court then proceeded to substitute what it considered Petitioner's "uncompromising attitude" respecting its *rea-*

sonable counterproposal for the Board's finding of an "adamant refusal" to contract with the Union except on "predictably unacceptable" terms as the basis for an inference of bad faith (*infra*, p. 28).

The Court ascribed an "adamant" position to the Petitioner only in connection with its proposal, after the strike was over, of "a provision that protected the jobs of replacements of strikers" (p. 28, *infra*)—a provision that was perfectly legal if the strike was, as the Trial Examiner found, an economic strike (R. 804).

2. *The Negotiators' Authority.*

A second finding from which the Board expressly inferred bad faith was "the limited authority of Respondent's negotiators to accept only the Respondent's [predictably unacceptable] contract," in the light of Petitioner's "predetermined position concerning union security and 'money matters.'" (R. 732, 733; pp. 51-53, *infra*). Unlike the Board, the Court inferred bad faith, not because of the nature of Petitioner's proposed contract and Petitioner's "predetermined position," but solely because of "inherent possibilities of delay" resulting from the fact that Petitioner's bargainers could not agree to changes involving "cost items" without first consulting their principals. In this connection the Court concluded (although the Board made no such finding):

> "Delays in referring proposals to the principals in New York and Boston were inevitable." (Neither the Trial Examiner nor the Board found that this in fact caused *any* delay.) "*It is true that prior contracts had been negotiated on this kind of basis.*" But it can at least be said that the inherent possibilities of delay did not contribute to ease in reaching an agreement." (pp. 29-30, *infra*. Italics added).

3. *Unilateral Acts.*

As a third basis for inferring bad faith, the Board cited three alleged "unilateral acts" of Petitioner in (i) chang-

ing the wages and duties of a fork-lift driver, (ii) changing the wage rate and work load of loom fixers, and (iii) putting into effect, after the strike began, the same general wage increase Petitioner had offered to the Union and the Union had rejected (R. 734, p. 53, *infra*).

The Court dismissed the fork-lift driver's raise as "insignificant" and the loom fixers' raise as "isolated" (p. 30, *infra*).

The Board concluded the general wage increase was not privileged because "no genuine impasse was reached on May 7, 1959" (R. 734, p. 53, *infra*). Directly contrary to the Board, the Court found, as had the Board's Trial Examiner, that:

> "*an impasse was reached on May 7.*" (p. 23, *infra*, Italics added).

The Court then proceeded to assume that the Board would have reached the same conclusion even if it had not improperly found that an impasse did not exist.

4. *Notices to Employees.*

A fourth basis that the Board advanced for inferring bad faith concerned three notices to employees that Petitioner had posted reporting on the bargaining with respect to wages. In this connection the Board found (R. 735, p. 54, *infra*):

> "* * * the form and timing of the notices were clearly calculated to impress the employees not only that the Respondent alone was entitled to credit for the increase, but that Respondent intended to offer the Union no more than the Respondent had already unilaterally determined to grant, without reference to the collective bargaining process."

On review, the Court held that *two of the three notices on which the Board relied were not material* (p. 31, *infra*). As to the third, dated April 24, 1959, it made its own inference of bad faith, not because, as the Board had found, the notice

displayed a disregard for the collective bargaining process, but because, as the Court proceeded to find, the notice placed "on the Union the onus of delay in making effective the proposed wage increase"[3] (p. 31, *infra*).

Supplying Information.

The Board also based its finding of bad faith on Petitioner's "dilatory attitude and reluctance to supply information" relating to wages, job descriptions, insurance and seniority, relying on this factor "solely as background information" to the extent that it was evidenced by incidents that occurred beyond the period of the six months statute of limitations [§ 10(b)] (R. 728, pp. 47-49, *infra*). After *rejecting* the Board's subsidiary findings that Petitioner had delayed supplying wage rates for more than five months and insurance information for more than eight months and had failed to furnish the Union with a seniority roster, the Court upheld the finding of "dilatory tactics" merely on the basis of Petitioner's furnishing on January 19, 1959, wage rates and some of the job descriptions it agreed on November 11, 1958, to supply to the Union, and its failure thereafter to prepare and furnish the balance of the requested job descriptions (pp. 25-26, *infra*).

In summary, out of the entire congeries of facts and inferences on which the Board expressly based its conclusion of bad faith, the Court below found substantial evidence

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[3] The parties met to negotiate on the morning of Friday, April 24. They agreed on a form of notice that Petitioner would post. The employees were to leave the mill for the weekend at 2:00 P. M. It therefore was important for them to know at that time whether they would work Monday at their old wages or at the ones they knew the Petitioner had proposed putting into effect on that day. The Union's representative did not approve the notice the Petitioner was to post until after 2:00 P. M. on Friday. The Petitioner, in the meantime, posted its own notice, which no one claimed was inaccurate, and posted the notice that the Union approved on Monday morning (R. 399-400, 468-469, 773-774).

to support only two: delay in supplying some wage information and failure to prepare and furnish some job descriptions, both of which items the Union requested more than nine months before it filed its original charge in this case.

Statutes Involved

The statutory provisions involved are Sections 7, 8(a)(1), 8(a)(3), 8(a)(5), 8(c), 8(d), 10(e) and 10(f) of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U. S. C. Sections 157, 158(a)(1), 158(a)(3), 158(a)(5), 158(c), 158(d), 160(e) and 160(f).

Reasons for Granting the Writ

I. *The Court Usurped a Function of the Board.*

In monitoring the conflicts and difficulties that inevitably arise when lower courts review the decisions and orders of administrative agencies, this Court continually and consistently has emphasized the importance of effectuating the clear Congressional intent that in administrative proceedings the Federal agency concerned, and not the reviewing court, has the sole responsibility for making all the factual determinations and inferences that are necessary for a resolution of the issues involved. The concern of this Court to assure compliance with the Congressional intent has already resulted in its expounding in *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474 (1951), the substantiality of evidence test that Congress prescribed as the criterion for judicial review of administrative orders, and, in *N. L. R. B.* v. *Walton Manufacturing Co.*, 369 U. S. 404 (1962), policing compliance with its admonitions in that regard.

The same concern has also led the Court to pronounce and apply another rule of review equally important to preventing judicial intrusion on the fact-finding function of administrative agencies. That rule, first exemplified in the

action the Court took in *N. L. R. B.* v. *Virginia Electric & Power Co.*, 314 U. S. 469, 479 (1941), found expression in *Securities and Exchange Commission* v. *Chenery Corporation*, 318 U. S. 80, 87-88 (1943):

> "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.
>
> * * * If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency."

The recent restatement of this rule in both the majority and dissenting opinions in *Communist Party of the United States* v. *Subversive Activities Control Board*, 367 U. S. 1, 67 and 135 (1960), and the conflict with respect to its proper application in the circumstances of that case is testimony to its continued vitality and importance.

The disposition of this case by the Court of Appeals violates the *Chenery* rule and usurps the function of the Board in two major respects: (1) by assuming the Board would have inferred bad faith even without at least three major findings on which the Board heavily relied and that the Court rejected, and (2) by making findings that the Board did not make and drawing inferences of bad faith from those new findings.

The Court of Appeals properly rejected as not supported by substantial evidence the Board's findings that Petitioner's contract proposal was "predictably unacceptable," that it adamantly refused to enter into a contract except on its own terms, and that no genuine impasse was reached when Petitioner granted a general wage increase.

A mere reading of the Decision and Order of the Board clearly reveals the extent to which the Board relied on these three rejected findings as support for its inference as to Petitioner's subjective intent. Thus the Board rests its finding of bad faith on its subsidiary findings that (1) Petitioner adamantly refused to contract with the Union except on its own "predictably unacceptable" terms, (2) Petitioner limited the authority of its negotiators to accepting only the "predictably unacceptable" contract Petitioner proposed,[5] (3) because of (1) and (2), "no genuine impasse was reached" and Petitioner's granting a wage increase was therefore not privileged, and (4) Petitioner's notices to its employees emphasized it intended to offer the Union no greater wage increase than it had already unilaterally decided to grant.

After deciding, as it properly did, that there was no substantial evidence to support findings on which the Board relied, the Court of Appeals would not, without usurping a function exclusively reserved to the Board, sustain the inference of bad faith that the Board drew from such *rejected* findings. This is particularly so where, as here, the Board's Trial Examiner (who did not treat the counter-proposal as "predictably unacceptable" or make the other erroneous findings on which the Board rested its conclusion) found no refusal to bargain in this case. It is for the Board, not the Court, to determine whether it will draw an inference of bad faith from circumstances so materially different from those it considered when it issued its Decision and Order.

But the Court of Appeals compounded this error when it proceeded to make a number of subsidiary findings of its own and based on them its own inferences of bad faith bargaining.

[5] The Board also relied on a statement of Petitioner's General Manager during the strike that he would not sign a contract with the Union unless it agreed with his ("predictably unacceptable") terms. The Court below properly ignored this statement. See fn. 1, p. 5, *supra*.

With respect to the wage increase, the Court found (although the Board did not) that Petitioner's granting without prejudice to further negotiations at the beginning of a strike, but after reaching an impasse, the identical wage increase it offered to and discussed with the Union and that the Union rejected as too low, was probative of bad faith. The Board, on the other hand, ascribed evidentiary value to the wage increase solely because it mistakenly found it to have occurred *before* an impasse was reached and therefore to have been a *per se* violation of Section 8(a)(5).

Again, the Court rejected two of the three notices that the Board relied on as evidence of bad faith and found the third notice to be "a calculated attempt to undermine the union prestige at the plant" because it placed "on the Union the onus of delay in making effective the proposed wage increase." The Board made no such finding with respect to any of the notices. It made the completely dissimilar finding that all three notices showed Petitioner's disregard for the bargaining process.

Finally, the Court found that Petitioner's restricting the authority of its negotiators with respect to "cost items" created "possibilities" of delaying negotiations. The Board made no finding of delay or "possibilities" of delay in the negotiations. The only subsidiary finding the Board made with respect to the negotiators' authority was that it evidenced Petitioner's determination to enter into a contract with the Union only on its own terms.

The Court of Appeals not only intruded on the Board's fact-finding function in making these new findings. By inferring bad faith from its own new and different findings, the Court further usurped the power Congress granted solely to the Board under the provisions of Sections 10(e) and 10(f) of the National Labor Relations Act, as amended, and effectively deprived the Petitioner of any opportunity to show that the Court's such findings, as well as the Board's, were erroneous.

The unintended but nevertheless effective sapping of the *Chenery* rule in the various ways that this case exemplifies requires recognition and correction by this Court if the dichotomy of the fact-finding and review functions in administrative proceedings is to continue unimpaired.

II. *The new findings, from which the Court inferred bad faith, are not evidence of bad faith.*

The decision of the Court below, if left undisturbed by this Court, will represent a new and long step toward a holding that almost any act an employer normally performs during contract negotiations may later constitute "substantial" evidence of bad faith bargaining if the negotiations result in an impasse. No longer will an employer seeking to resist "unusual" and "unacceptable" bargaining demands be well-advised to believe, as did Petitioner and its attorney-negotiator in this case,

(1) that this Court in *N. L. R. B.* v. *Crompton-Highland Mills, Inc.*, 337 U. S. 217, 224-225 (1949), and again in *N. L. R. B.* v. *Katz*, 369 U. S. 736, 745 (1962) and the decisions of Courts of Appeal in *N. L. R. B.* v. *Bradley-Washfountain Co.*, 192 F. 2d 144 (7th Cir. 1951); *N. L. R. B.* v. *Landis Tool Co.*, 193 F. 2d 279 (3d Cir. 1952), *N. L. R. B.* v. *United Brass Works, Inc.*, 287 F. 2d 689, 697 (4th Cir. 1961), and *N. L. R. B.* v. *U. S. Sonics Corporation*, 312 F. 2d 610 (1st Cir. 1963), made it clear that an employer's granting, after notice, consultation and impasse, and without prejudice, a wage increase identical with one the union rejected as too low, was not evidence of bargaining in bad faith;

(2) that a notice placing on the Union "the onus of delay", in making effective a proposed wage increase could not, under the express provisions of Section 8(c) of the National Labor Relations Act, as amended, be evidence of a refusal to bargain, so long as it "contains no threat of reprisal or force or promise of benefit";

(3) that, as the Board itself in *McLean-Arkansas Lumber Co., Inc.*, 109 N. L. R. B. 1022, 1038 (1954), pointed out, an employer need not clothe his negotiators with blanket authority in order to avoid a charge of bargaining in bad faith, so long as the employer keeps in constant touch with the negotiations and is available for consultation; and

(4) that the provisions of Section 8(d) of the Act as interpreted by this Court in *N. L. R. B. v. American National Insurance Co.*, 343 U. S. 395, 404 (1952), and applied in *White* v. *N. L. R. B.*, 255 F. 2d 564 (5th Cir. 1958); *N. L. R. B. v. Cambria Clay Products Co.*, 215 F. 2d 48 (6th Cir. 1954); *N. L. R. B. v. Lewin-Mathes Co.*, 285 F. 2d 329, 332-333 (7th Cir. 1960) and *N. L. R. B. v. Nash-Finch Co.*, 211 F. 2d 622, 627 (8th Cir. 1954) permit an employer to refuse during negotiations to compromise on the terms of his reasonable counterproposal, so long as he does not enter negotiations with a predetermined intention not to compromise.

The extraordinary concept of what constitutes evidence of bad faith bargaining that the Court below (but not the Board) has expressed in this case would destroy all of these guide lines on which bargainers have so often relied when travelling the cat-walk of resisting unacceptable demands.

The importance to the public of settling the question as to what constitutes or is evidence of bad faith bargaining, particularly when, as here, "[f]ew concessions were granted by either party" (R. 807), is indicated in the numerous legal articles that recently have appeared on the subject.

In a recent address before the Southwestern Legal Foundation's Ninth Annual Institute on Labor Law, published in 14 *Lab. L. J.* 18 (Jan., 1963), Board Member Fanning discussed the degree of subtlety involved in determining "How hard can an employer or a union bargain within the bounds of 'good faith'?" After detailing examples of "how many

variations of this [hard bargaining] technique can be developed and with what degree of sophistication and care the Board will have to treat the problem." Mr. Fanning concluded:

> "It seems likely that the Supreme Court will eventually have to give guidance in this area."

Petitioner respectfully submits that this case, in which the employer's conduct during the negotiations loomed so large and was successively characterized (on the same state of facts) as "hard bargaining" by the Trial Examiner, "adamant refusal to enter into a contract with the Union except on its own terms" by the Board, and an "uncompromising attitude" by the Court of Appeals, presents this Court now with the opportunity to provide the guidance that the parties to 100,000 annual labor negotiations would welcome.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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Dated: May 9, 1963

APPENDIX A

Statutes

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C., Secs. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *

(5) to refuse to bargain collectively with the representatives of his employees * * *

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached, if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. * * *

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * * Upon the filing of the record with it the jurisdiction

of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

APPENDIX B

Opinions and Decree Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 31, 32, 33—October Term, 1962

(Argued October 11, 1962 Decided January 9, 1963)

Docket Nos. 27422, 27224, 27218

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

FITZGERALD MILLS CORPORATION,
Respondent.

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

FITZGERALD MILLS CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Before:

CLARK, MOORE and SMITH, *Circuit Judges.*

In No. 27422 the National Labor Relations Board petitions for enforcement of its order requiring Fitzgerald Mills to cease and desist from certain unfair labor practices and reinstate strikers with back pay. No. 27224 is a petition by the Textile Workers Union of America for modification. No. 27318 is a petition by Fitzgerald to review and set aside the order. Enforcement granted. Petitions of Fitzgerald and the Union denied.

Morton Nambow, Attorney, National Labor Relations Board (Stuart Rothman, General Counsel, Dominick L. Manoli, Asso. Gen. Counsel, Marcel Mallet-Prevost, Asst. Gen. Counsel, and Allison W. Brown, Jr., Attorney, National Labor Relations Board, on the brief), *for National Labor Relations Board.*

Edward Wynne, New York, N. Y. (Benjamin Wyle, New York, N. Y., on the brief), *for Textile Workers Union.*

Theodore R. Iserman, New York, N. Y. (Kelley Drye Newhall Maginnes & Warren, and Constangy & Prowell, New York, N. Y., on the brief), *for Fitzgerald Mills.*

Smith, *Circuit Judge.*

No. 27224 is before us on the Union's petition under § 10(f) of the National Labor Relations Act, as amended, 29 U. S. C. 160(f), to review and modify certain portions of an NLRB order of October 11, 1961, 133 NLRB No. 38, against Fitzgerald Mills Corp. In No. 27422, the Board petitions under § 10(c) of the NLRA, 29 U. S. C. 160(c), for enforcement of its order against Fitzgerald, while in No. 27318, Fitzgerald petitions the Court under § 10(f), 29 U. S. C. 160(f), to review and set aside the order. The

Board found that Fitzgerald refused to bargain in good faith in violation of NLRA § 8(a)(5) and 8(a)(1), relying primarily on dilatory tactics, intransigence in negotiations, the limitations on authority of Company negotiators, and certain "unilateral acts"; that it violated § 8(a)(1) by making coercive statements and soliciting strikers to abandon the Union; and that it violated § 8(a)(3) and 8(a)(1) by denying reinstatement to some unfair labor practice strikers and reinstating others without accrued seniority. Other statements were found to be noncoercive. It therefore ordered the Company to cease and desist from the unfair labor practices found, and ordered reinstatement of the strikers with full seniority and back pay. We find that on consideration of the record as a whole substantial evidence supports the Board's findings. We deny the petitions of Fitzgerald and the Union, and order enforcement.

The employer, Fitzgerald Mills, is a Georgia corporation operating a cotton mill in Fitzgerald, Georgia. After an election in 1952 certifying Textile Workers Union of America, the union here involved, the Company operated under contracts with it until the events here in suit in 1959. The latest contract was signed March 25, 1957, subject to termination on March 25, 1959, on 60 days notice by either party. On January 20, 1959 the Union gave notice of termination, set forth generally its demands to be incorporated in a new contract in a letter on February 16, and submitted a proposed contract on March 2. The Company submitted its counterproposal on April 4, and negotiations proceeded sporadically until an impasse was reached on May 7. A strike was voted on May 9, and picketing began May 11. Bargaining continued during the strike under the auspices of a federal mediator without agreement. The Union ended the strike on July 6, and some of the employees were rehired without seniority. On July 10, the Company announced that any contract must contain provisions that no strikers permanently replaced would have rights under the contract and that those rehired would have no right to their seniority or old jobs. This ended the negotiations.

29 U. S. C. 160(b) provides that no complaint shall issue for an unfair labor practice committed six months or more before the signing of the complaint. As the charge here was filed June 29, 1959, nothing prior to December 29, 1958 can be made the basis for an unfair labor practice charge, even if an unfair labor practice itself. But the earlier events may be considered as illuminative of the true character of later events within the limitations period. *Machinists Local* v. *Labor Board*, 362 U. S. 411, 416 (1960). The collective impact of long delay, found in part from evidence outside the six-month period, would be a proper basis for a finding by the NLRB that bargaining was not conducted in good faith. *NLRB* v. *National Shoes, Inc.*, 208 F. 2d 688 (2 Cir. 1953).

To establish dilatory tactics, the Board relies on asserted delays in furnishing wage and job descriptions, information on an employee's insurance policy, and a seniority roster. The Union first demanded wage information and job descriptions, which the Company was required to furnish under the existing contract, on September 23, 1958. The Company agreed to provide this data in a letter of November 11. At a meeting on November 28, the Union also requested "the social security earnings of the dofferwister." The Union filed an unfair labor practice complaint on December 3, 1958, as a result of the failure of the Company to provide any information to that date. It was withdrawn in February, 1959, the Company having sent a partial job description and wage information list on January 19, 1959. The Union complained of omissions by a letter of February 11. The Company reply on February 20, was that the preparation of job descriptions was time-consuming and that they would be forwarded as completed. But none had been completed in the intervening month, apparently. Nor does it appear that further descriptions have ever been furnished. On February 11, a new demand was made for "social security earnings of workers." The Company asked for clarification on February 25, and after

the Union reply promptly forwarded complete information, which appeared to fulfill this particular demand.

The Company furnished a copy of the insurance policy in question on June 4. The Union claims that it was demanded during the negotiations in April; the Company witnesses testified that the first demand was on June 1. Oddly enough, the President of the Local admitted that he had had a copy all along, while a Company witness testified that they had never furnished anyone with the policy. The discrepancy may have resulted from the apparent fact that the Company unilaterally replaced the policy in effect under the 1955 agreement with a new one in 1957. And the confusion of the witnesses might be explained by assuming that the Union never did get the new policy but did have a copy of the old one. But it seems that the Union would not ask for the new policy until it realized that the old one was no longer in effect. Thus, we may credit the Company witnesses here that no demand was made until relatively late in negotiations. As only a few weeks did elapse during the alleged delay, and the Union contract provided what appears to be a complete schedule of proposed benefits, it is not apparent how negotiations would be impeded by the refusal, if such it was, to furnish a copy of the new policy.

In the Union letter of September 23, 1958, a demand pursuant to the contract was made for a seniority roster. The Company replied on November 11 that one had been furnished. The Union admitted that one had been sent, but asserted that it was "incomplete and unsatisfactory." However, a different list was posted after the November 28th meeting, and nothing more appears to have been said on the matter. In view of the failure to make a further point of this, we do not find in it a ground to support the finding of dilatory tactics.

However, even disregarding the seniority roster and insurance contract delays as evidentiary basis for the sub-

sidiary finding of dilatoriness, the former as unsupported in the facts and the latter as based on a disregard of so much contrary evidence as to be unpersuasive, substantial evidence to support the finding is revealed by the long and unexplained delay to furnish even partial wage and job classification data and the failure to make a complete job classification in all of the months after the demand was made, and even to date. The withdrawal of the unfair labor practice charge does not necessarily indicate compliance or that the Union was satisfied; but only that it felt that the Company had begun to enter into compliance. Moreover, failure to supply requested wage data is a refusal to bargain in violation of § 8(a)(5) and (1), standing alone. The Union need not show how the data will be relevant to the bargaining; it is presumably so when negotiations are for higher wages. And even if the Union negotiated a contract without the data, this does not render the information irrelevant. *NLRB* v. *Yawman & Erbe Mfg. Co.*, 187 F. 2d 947 (2 Cir. 1951). The Union thus had a right to this information under the NLRA as well as under its contract, and the excessive delay in providing it supports the ultimate conclusion that later bargaining was not conducted in good faith.

The finding of Company intransigence is based "on the nature of Respondent's counterproposal and its adamant refusal to enter a contract with the Union except on its own terms." At the outset, we wish to make clear that the terms of the Company contract find no support to this finding in our view. In the realities of the bargaining process neither party expects its first proposal to be accepted. Since the Company's contract here did provide the basis for future negotiations, it is apparent that the extreme situation illustrated in *NLRB* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131 (1 Cir. 1953), cert. denied 346 U. S. 887 (1953), is not presented. Indeed, if either contract can be said to have been "predictably unacceptable" it might well be the Union's, which contained some unusual

demands: all strikes were considered unauthorized unless expressly ratified by the General President of the Union—the Union simply agreeing that it would not authorize any strikes; all wage disputes were to be compulsorily submitted to binding arbitration.

"Consideration of the negotiations themselves, rather than the proposed contracts within whose framework they were conducted, is a better guide to whether there was good faith bargaining. After the Union submitted its proposed contract on March 2, the next meeting was held March 22 at which time the expiring contract was extended one month to April 25. No other action was taken, the Company negotiators stating that they needed more time to study the Union proposals. The Company did agree to submit its own proposed contract by April 6, and this was done on April 4. The only major bargaining meetings held prior to the strike were on April 10 and 24, and taking the testimony of Prowell (a Company negotiator) as credible, only two minor concessions were made by the Company: they conceded that they might allow a provision under "Grievances" permitting inspection of the plant by a Union representative and might resolve two pending grievances before the new contract went into effect. The Union made a number of retreats from its original demands, accepting Company proposals or offering to agree to provisions of the expiring contract, which were more favorable than the Company proposals. At the May 2 meeting, it was said that the Company refusals to compromise its wage and check-off proposals and the Union reply that it would call a strike.

After the strike on May 11, a meeting was held on June 1, under the auspices of the Federal Mediation and Conciliation Service. The Company made concessions here concerning arbitration, time limits on grievances, physical fitness, and temporary and permanent jobs, and offered one other concerning workload, to add back a paragraph from the previous contract. The next meeting was July

1, and the parties appeared to be in substantial agreement with the exception of the differing wage proposals and the Company refusal to agree to a check-off provision. The last meeting was on July 10, after the end of the strike on July 6. At the last meeting, the parties had no further discussion of the contract proposals, as the Company insisted on a provision that protected the jobs of the replacements of the strikers and the Union refused to sign any contract which did not give the strikers back their old jobs.

"The problem is essentially to determine from the record the intention or state of mind of respondents in the matter of their negotiations with the union." *NLRB v. National Shoes, Inc.*, 208 F. 2d 688, 691 (2 Cir., 1953). The failure of negotiations is not of itself determinative, but "the duty to bargain in good faith is not satisfied by merely meeting with Union representatives to inform them that the employer cannot or will not change its position." *NLRB v. Israel Putnam Mills*, 197 F. 2d 116 (2 Cir. 1952); see also *Vanderhall Prods. v. NLRB*, 290 F. 2d 85 (2 Cir. 1961); *NLRB v. Century Cereal Mfg. Co.*, 208 F. 2d 84 (2 Cir. 1953); *Magnet v. NLRB*, 198 F. 2d 735 (6 Cir. 1952). In the case at bar, there was bargaining, narrowly limited by the Company before the strike and somewhat more freely entered into thereafter, but cappedby the adamant refusal to consider anything but the Company's harsh position on rehiring of the strikers. The manner of bargaining prior to the strike is not necessarily conclusive of a refusal to bargain in good faith, but the uncompromising attitude it revealed is substantial support for the Board determination that the intention or state of mind of the Company negotiators in meeting with the Union was not one of good faith. The abrupt termination of negotiations when agreement had nearly been reached after the strike had failed also indicates an intent that no agreement be reached and that the Union be forced into a self-destructive strike.

The Board also relies in part on its finding of limited authority of the Company negotiators. The Company's witness Clark (the plant general manager) testified that he was given authority to sign a contract but was required to consult on the check-off and money matters (not specifically wages) and get the approval of the owners in New York. On cross-examination, it was brought out that money matters included more than wages: e.g., vacations, paid holidays, insurance benefits, severance pay. The Company's witness Prowell (one of the attorneys) testified that he had no authority to agree to the check-off or to a wage increase. Constangy (the other Company attorney) testified that he recommended to Botelho (the chief Union negotiator) that he (Botelho) go up and see Horblit (the principal stockholder in Boston) for a discussion on wages. Constangy also considered holidays and vacations to be "cost items" which had to be referred back to the principals for approval. Barker, a Union international representative, testified that Prowell stated at the meeting at which Constangy was not present that he had no authority to agree to anything. Botelho testified that he did meet with Horblit in Boston on April 20. He also testified that Prowell was unable to make any agreement without Constangy's approval.

To sum up, it appears that before the strike on May 11, there were meetings at the following dates: March 23 (at which time the Company did not discuss proposals but requested more time to study them); April 10; April 24 (at which Constangy was not present and no agreement was possible); May 7 (lasting only a few minutes, at which the Company stated that it would adhere to its original proposals and the Union replied that it would strike). Although there was a little confusion on this, the conclusion is that there was only one meeting at which agreements could be reached. Delays in referring proposals to the principals in New York and Boston were inevitable. It is true that prior contracts had been negotiated on this kind of basis. But it can at least be said that the inherent

possibilities of delay did not contribute to ease in reaching an agreement.

If in other respects good faith is found it is not enough to establish an unfair labor practice solely that the representative of the Company was not empowered to enter into a binding agreement. *Lloyd A. Fry Roofing Co.* v. *NLRB*, 216 F. 2d 273 (9 Cir. 1954), *modified* 220 F. 2d 432 (9 Cir. 1955). It is, however, proper to take the powers of the actual negotiators into account, *id.* at 275; *Great Southern Trucking Co.* v. *NLRB*, 127 F. 2d 180, 185 (4 Cir. 1942), cert. denied 317 U. S. 652 (1942). That they were not authorized to enter into an agreement is an obstacle to the bargaining process which lends weight to the Board's conclusion that the Company intended that no agreement be reached.

The Board relied in part also on unilateral acts by the Company. The wages and duties of the forklift driver had been changed during 60 days prior to April 10, when the Union was first informed of the change. This is uncontested from the record. This in itself is not "substantial". It is at most a violation of the 1957 contract then in force in that the Company failed to give notice of the change in advance of making it. The Company contends in its brief that this change was a prerogative reserved by it under the Management Clause. Without attempting to resolve this contractual problem, even assuming that it is a violation, it adds so little that it must be dismissed as insignificant, and no weight given in the ultimate determination whether the Company did not bargain in good faith.

The wage increase is by far the most important "unilateral act". At the meeting of May 7, Constangy testified that he told Botelho that the Company would not retreat from its positions on wages and check-off. Botelho replied that he would "recommend" a strike. Constangy answered that the wage increase would be put in effect the following Monday, May 11. Others present at the meeting corroborate this. It is uncontested that a strike meeting was called on May 9, and a strike was voted which began May 11.

The wage increase apparently went into effect May 11, although the Company notice to this effect stated that it would go into effect *immediately* (emphasis in original) and it was dated May 7. Isolated wage increases for a few employees during negotiations cannot be characterized as unfair labor practice probative of bad faith. *White* v. *NLRB*, 255 F. 2d 564 (5 Cir. 1958); *NLRB* v. *Superior Fireproof Door & Sash Co.*, 289 F. 2d 713 (2 Cir. 1961). But where unilateral wage increases have been made while they were the subject of bargaining, this combined with unilateral changes in workloads has been found enough to support a finding of bad faith bargaining. *NLRB* v. *Bonham Cotton Mills, Inc.*, 289 F. 2d 903 (5 Cir. 1961). And a wage increase given after a strike has been called and been unsuccessful, has been held to be evidence probative of prior bad faith in negotiations. *Majure* v. *NLRB*, 198 F. 2d 735 (5 Cir. 1952). The announcement of the increase contemporaneously with the strike decision could well be found a deliberate attempt by the Company to deal individually with the employees, and convince them that all benefits would come from the Company's sole choice, thereby weakening the Union in its strike effort. This timing is particularly convincing support for the conclusion that prior negotiations were not conducted in good faith.

The Board relies also on notices posted by the Company on April 6, 13 and 24. Of these, only the two notices posted April 24 appear material. The parties had agreed that a notice should be posted and one was agreed on and mailed from Atlanta to Fitzgerald where it was posted April 27. In the meantime, however, a notice in terms placing on the Union the onus of delay in making effective the proposed wage increase was telephoned by Company representatives to the plant and posted by 2 o'clock on the 24th. This calculated attempt to undermine Union prestige at the plant is further evidence of refusal to bargain in good faith. *NLRB* v. *Century Cement Mfg. Co.*, 208 F. 2d 84, 86 (2 Cir. 1953); *NLRB* v. *Winona Textile Mills, Inc.*, 160 F. 2d 261 (8 Cir. 1947).

The Board, overruling the Trial Examiner, found that General Manager Clark had attacked the Union during the strike in coercive statements to employees. The Union presented much evidence that on May 22 Clark stated to strikers in effect: "Get those union agitating sons of bitches out of Fitzgerald" and that he would die and go to hell before he would sign a contract." The examiner thought Clark's denials of such statements more consistent with the progress of negotiations before and after May 22. It is within the power of the Board to overrule the Hearing Examiner whose credibility is involved "if his findings conflict with strong inferences from evidence which he credited." *Utica Observer-Dispatch, Inc.* v. *NLRB*, 229 F. 2d 575, 577 (2 Cir. 1956); see also *NLRB* v. *Pure Molding Corp.*, 226 F. 2d 818 (2 Cir. 1955). The Board is justified by the whole record here in drawing such inferences.

The evidence of the unilateral wage increase, the notices, the limited authority and the uncompromising bargaining attitude, in the light of the earlier failure to furnish information meet the requirement of substantial evidence on the record as a whole, *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474 (1951), to sustain the Board's finding of refusal to bargain in good faith. Indeed there was additional evidence, on which the Board apparently did not rely, in Constangy's admitted statement encouraging the Union to strike, which clearly demonstrated the intent of the chief Company negotiator to reach no agreement.

Turning to the Board's conclusion that the strike was an unfair labor practices strike rather than an economic strike, we find the Board's finding supported, first by Botelho's protest to Horblit on April 20 that "the local management was not entering good faith bargaining with the union"; second by the Union telegram to Horblit May 7 in effect that the Company position, adhering to its original proposals compelled Botelho to recommend a strike; third, Botelho's statements to the Union meeting May 9 that the Company was out to destroy the Union,

that the history of the negotiations showed that the Union had been unable to bargain with the Company, and that the Company was not bargaining in good faith; fourth, the Union letter of May 12 to the strikers mentioning lack of good faith bargaining; and fifth, the Union strike notice mailed May 7 to call the meeting May 9, characterizing the Company proposal as "sub standard" and an "insult". These are substantial evidence to support the Board's finding. A strike may be an unfair practice strike even though it also has economic objectives. *NLRB* v. *A. Sartorius & Co.*, 140 F. 2d 203 (2 Cir. 1944); *NLRB* v. *Stackpole Carbon Co.*, 105 F. 2d 167 (3 Cir. 1939), cert. denied 308 U. S. 605 (1939); *Butcher Boy Refrigerator Door Co.* v. *NLRB*, 294 F. 2d 22 (7 Cir. 1961). Unfair labor practice strikers must be rehired on demand, *NLRB* v. *Sunrise Lumber & Trim Co.*, 241 F. 2d 620 (2 Cir. 1957), cert. denied 355 U. S. 835 (1957); *Mastro Plastics Corp.* v. *NLRB*, 350 U. S. 270, 278 (1956), and are entitled to receive reinstatement and back pay if they are not. Such an unconditional demand for reinstatement was made at least by July 15 and possibly earlier. They are entitled to reinstatement with back pay even though there were also other causes of the strike. *NLRB* v. *Remington Rand Inc.*, 94 F. 2d 862 (2 Cir. 1938), cert. denied 304 U. S. 576 (1938). Since there was substantial evidence to support the Board's finding that refusal to bargain in good faith was at least one cause of the strike, the portion of the order requiring reinstatement and back pay must be enforced.

The finding of violations of § 8(a)(1) is supported by statements by General Manager Clark, discussed above, and by statements by Foreman McDowell to employee Woodward on two occasions: "* * * if we wanted to keep our jobs we better just leave the union alone" prior to the strike, and "that if I had not walked out I would have a regular job on the first or second shift on * * * [the] said, 'I could have told you that after you became a member of the union, in fact, I tried to' " in November after [illegible]

strike. That these statements, in the light of the circumstances surrounding their making were coercive is surely a permissible finding, and hence must be held outside the Free-speech protection of § 8(c) of the Act. The Union contends that additional statements of Clark to employees Clemons and Peacock should also have been found violations. In their settings, these remarks, although derogatory of the Union, were properly held not coercive, and we uphold the Board's finding. *NLRB* v. *Sandy Hill Iron & Brass Works*, 165 F. 2d 660 (2 Cir. 1947).

Moreover, it is difficult to see what would be gained for any purpose by amending the Board's order in this regard, for the order is quite broad in prohibiting interference with, restraint or coercion of the employees in their union activities.

The petitions of the Employer and the Union are denied. Enforcement of the Board's order in full is ordered.

Moore, C. J. (*dissenting*):

In my opinion, the factual and legal conclusions of the Trial Examiner were clearly supported by substantial evidence. During the hearings which continued for some days, he had an opportunity unavailable to the Board or to this Court properly to appraise the demeanor and credibility of the witnesses. The inferences which he drew should be entitled to more weight than inferences made by others not present. The National Labor Relations Act was designed to promote good will and harmony between employer, employee and union. Here Company and Union had shown themselves capable of successful and peaceful labor negotiations for some twelve years. This is not the kind of background against which to make a finding of bad faith based largely on inference just because the negotiations in 1958-59 turned out to be more protracted than prior negotiations.

I. Good Faith Bargaining.

The statutory requirement that both parties to a collective bargaining contract meet and "bargain in good faith" has given the Board and the courts considerable difficulty. The appropriate standard, "a desire not to reach an agreement with the union", is necessarily highly subjective. *NLRB* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131, 134 (1st Cir. 1953), cert. denied 746 U. S. 887 (1953). The statute was not intended to require agreement by the parties or to permit the Board or the courts to impose on the parties their concept of an appropriate agreement under the circumstances. *NLRB* v. *American National Insurance Co.*, 343 U. S. 395, 402 (1952). What is required is that the parties meet to disclose their proposals, that such proposals be the subject of discussion so that each party be aware of the other's views and so that compromise between them be made more likely, and that neither party place insurmountable obstacles in the path of agreeable reconciliation of opposing demands. The record clearly supports the conclusion that at all times the Company was prepared to come to an agreement with this Union albeit on terms that the Union may have found unsatisfactory. In this regard the Trial Examiner found:

> "In my opinion the record supports a finding herein that both parties in their negotiations prior to the strike on May 9, 1959, met at reasonable times and conferred in good faith with respect to terms and conditions of employment with the expectation of reaching agreement and executing a written contract incorporating any agreement reached."

The Board justified its conclusion that the Company refused to bargain in good faith by inferring a Company state of mind from several occurrences, namely that: (1) the Company engaged in dilatory tactics by its delayed and in some instances complete failure to supply requested information concerning wage rates, job descriptions, seniority rosters and insurance benefits; (2) the submission of a

"predictably unacceptable" counterproposal and an uncompromising attitude during the course of negotiations; (3) the limited authority of the Company's negotiators at the bargaining table; (4) unilateral changes in the wages and work loads of the forklift driver and the loomfixers; (5) notices during the course of negotiations by the Company informing the employees of proposed wage increases not accepted by the Union; (6) certain remarks of General Manager Clark; (7) the Company's proposal after the strike had been initiated that the Union waive any right to reinstatement of the strikers. The majority has rejected certain of these subsidiary findings as either unsupported by substantial evidence or of such minimal effect that they cannot be deemed of any significance in determining the Company's attitude toward negotiations.

(a) *Dilatory tactics.* The Board found that the Company displayed a reluctance to provide information requested by the Union on September 23, 1958. The majority properly rejects this finding as unsupported in the record with respect to the requests for seniority rosters or insurance benefits. However, the majority does find substantial support for a finding of dilatory tactics by virtue of the delay in providing wage data and the failure to make a complete job classification analysis as requested.

A letter from the Union on September 23, 1958 requested, *inter alia*, "wage rate information". On November 11, 1958, the Company agreed to supply this and it was given to the Union on January 19, 1959. The Union found this information to be incomplete with respect to incentive rates, requesting on February 11, 1958 that instead of the wage scale for incentive workers according to percentage efficiency already provided, that the Union be supplied with the average earnings of incentive workers for the last two Social Security quarters of the preceding year. The Company again agreed to supply this data on February 20, 1958 and following correspondence clarifying the request, it was submitted to the Union on March 6,

1959. The majority characterizes the delay in providing this information as excessive. I cannot agree. Although the wage information delivered to the Union on January 19, 1959 might have been forthcoming at an earlier date, it is significant that the letter supplying that information included a partial job classification analysis that had taken some time to prepare. In addition, the period of time after January 19, 1959 was the result of the Union's request for wage information in a form not before demanded, and this additional request was complied with almost immediately.

With respect to the job classification data, admittedly a complete listing was never furnished to the Union. It is uncertain whether this by itself would constitute an unfair labor practice in the case where such job descriptions had never before been compiled, *compare N.L.R.B. v. United Brass Works, Inc.*, 287 F. 2d 689, 697 (4th Cir. 1961) and *Exchange Parts Co., v. International Bhd. of Boilermakers* (*Exchange Parts Co.*), 139 NLRB No. 39 (Oct. 31, 1962), *with United Steelworkers Union (Hanson Mfg.)*, 137 NLRB No. 38 (May 24, 1962).

(b) *The submission of a "predictably unacceptable" counterproposal and an uncompromising attitude during the course of negotiations.* The majority opinion rejects this characterization of the Company's counterproposal and instead finds that "if either contract can be said to have been 'predictably unacceptable' it might well be the Union's". Nevertheless, it then proceeds to analyze the negotiations, finding an "uncompromising attitude" on the part of the Company. Implicit in the finding of the Board and the majority is a determination on their parts that the Company was acting improperly in adhering to its original proposal. The course of negotiations demonstrates a greater willingness on the part of the Union than the Company to recede from its original position. This, however, would naturally follow from the fact that it was the Union's original proposal that was such a radical

departure from the prior collective bargaining contract. Furthermore, it is not the function of the National Labor Relations Board or the federal courts to determine the proper resolution of differences arising during the course of negotiations. The *Prince* standard of "a desire not to reach agreement with the Union" does not require a Company to enter into negotiations with a completely open mind concerning the subjects to be discussed. By necessity, a Company may begin negotiations with certain firmly felt convictions on the matters subject to negotiation, and as to matters properly the subject of bargaining "neither party is legally obligated to yield." (*NLRB* v. *Borg-Warner Corp.*, 356 U. S. 342, 349) (1958). The Supreme Court has said:

> "'Thus it is now apparent from the statute itself that the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position.'"

NLRB v. *American National Insurance Co.*, *supra*, at 404. The Trial Examiner's finding that the parties met at reasonable times with the expectation of reaching agreement is fully supported in the record, and there is no substantial evidence in the record to support a contrary finding.

(c) *The limited authority of the Company's negotiators.* Although the lack of authority given negotiators is not a *per se* violation of Section 8(a)(5), it is a factor to be considered in the light of all the other circumstances. The negotiators here were limited in their power to come to an agreement with respect to wages and the check-off proposals. However, they were authorized to negotiate certain other provisions in dispute and did compromise some of these issues at a bargaining conference on June 1, 1959. This is not the kind of case in which the negotiators were without any authority to vary the Company's proposals, and those with sufficient authority were out of reach. On the contrary, the Company's negotiators were in constant touch with the Company's president, Horblit, apparently calling him after every bargaining session. See *McLean*,

Arkansas Lumber Co., 109 N.L.R.B. 1022, 1038 (1954). In addition, at the suggestion of Constangy, one of the Company's negotiators, Botelho, the Union's representative, traveled from Georgia to Boston to meet with Mr. Horblit. As the Court of Appeals for the Ninth Circuit has said in holding that lack of authority is not a *per se* violation of 8(a)(5):

> "Union representatives were at liberty to discuss with Bahrs any and all proposals and counter-proposals and thus secure clarification of the issues, an important element in reaching agreement. Bahrs could, and did, make recommendations to the Company, and thereby conveyed to it an appraisal of the situation and the Union's demands."

Lloyd A. Fry Roofing Co. v. NLRB, 216 F. 2d 273, 276 (9th Cir. 1954), modified 220 F. 2d 432 (9th Cir. 1955).

(d) *Unilateral acts in changing wages and work loads of the forklift driver and boomfiers.* The majority characterizes this element of the Board's case as insubstantial and insignificant, and to be given no weight in the ultimate determination. At most it raises a question of interpretation of the then existing collective-bargaining agreement.

(e) *Unilateral wage increase.* The majority places great reliance on the unilateral wage increase granted to the workers, effective on either May 7th or 11th, after the parties had reached an impasse in negotiations and after the Union had informed the Company that it intended to strike. Recently the Supreme Court in *NLRB* v. *Katz*, 369 U. S. 736 (1962) held that a unilateral wage increase granted to workers during the course of negotiations but before the existence of an impasse and without consultation with the Union constituted a violation of the Company's duty to bargain in good faith, even in the absence of a Board finding of overall bad faith in the conduct of the negotiations. The Court there stated in a footnote:

> "Of course, there is no resemblance between this situation and one wherein an employer, after noting

and consultation, "unilaterally" institutes a wage increase identical with one which the union has rejected as too low." *See Labor Board v. Bradley Washfountain Co.*, 192 F. 2d 144, 150-152; *Labor Board v. Landis Tool Co.*, 193 F. 2d 279.

NLRB v. Katz, supra, at p. 745, n. 12. "That is exactly the case here. The wage increase granted was the same 10¢ increase offered to the Union in the course of negotiations and the Union was notified of the Company's intention to put it into effect immediately. The footnote and the cases apparently cited with approval therein make clear that there is to be no inference from the Company's unilateral wage increase here. As the Supreme Court on another occasion has stated:

> "We do not here have a unilateral grant of an increase in pay made by an employer after the same proposal has been made by the employer in the course of collective bargaining but has been left unaccepted or even rejected at those negotiations. Such a grant might well carry no disparagement of the collective bargaining proceedings. Instead of being regarded as an unfair labor practice, it might be welcomed by the bargaining representative, without prejudice to the rest of the negotiations." *NLRB v. Crompton Highland Mills, Inc.*, 337 U. S. 217, 224 (1949).

Nor are the cases cited by the majority apposite. In *NLRB v. Exchange Cotton Mills, Inc.*, 289 F. 2d 903 (5th Cir. 1961), the wage increase was granted without prior notification of the Union. *Mann v. NLRB*, 198 F. 2d 733 (5th Cir. 1952) is even further off point. There the present rate of commissions, a subject for bargaining, was 15%. The Company had proposed that the rate remain the same; the Union was requesting a 25% rate. During negotiations the Union had indicated its willingness to compromise at a 20% figure, but this was rejected by the Company. However, after the negotiations had broken down, the Company unilaterally instituted an increase to the 20% figure already

rejected by the Company during the prior bargaining sessions.

(f) *Remarks of General Manager Clark.* The Board relied on remarks made by the General Manager on several occasions to striking employees outside the plant and to non-striking employees within the plant. On May 22, 1959, Clark drove to the plant in his automobile and stopped in front of the gate near his office to engage in conversation with several strikers. The Trial Examiner credited Clark's version because it was more consistent with the past and subsequent negotiations between the parties. The Board rejected the Examiner's finding in this regard, solely on the ground that if he were incorrect in his characterization of the bargaining, the underlying basis for his credibility finding, then his ultimate conclusion as to credibility must fail, but the Examiner's finding was also based in part on the past history, running back some twelve years, of successful and peaceful negotiations between the Company and the Union.

The Board also relied on statements made by Clark to non-striking employees in the plant which the Board concluded revealed that the Company was not meeting with the Union with an open mind and an intention to reach agreement. The only remarks that might be so construed were made on May 25, 1959 to a non-striking employee that "he would not start a contract with the Union unless they came to his deficiencies." This was an isolated remark made after months of unsuccessful negotiations at a time when the positions of both the Company and the Union had become firmly established.

(g) *The Company's proposal made after the strike had been initiated that the Union waive certain rights on behalf of the strikers.* The Board's use of this demand is predicated on its view that the strike was an unfair labor practice strike and that the Company was in effect asking the Union to agree to the waiver of absolute rights to reinstatement on the part of the striking employees. However,

if in fact this was an economic strike, then there was nothing improper about the Company's proposal since most of the strikers had been replaced by other workers.

In my opinion, there is not sufficient evidence of bad faith in this case. As a minimum, however, this case calls for a remand to the Board for a redetermination of their finding in the light of the majority's rejection of some of the grounds on which the Board's conclusion was based, especially the majority's heavy reliance on the unilateral wage increase, a ground I would hold to be clearly error as a matter of law. See *Bell-R. Reproductions, Inc.* v. *NLRB*, F. 2d (2d Cir. Nov. 5, 1962) (Friendly, J., concurring and dissenting).

II. Reinstatement.

The Trial Examiner, after finding that the Company had bargained in good faith, held that the strike was an economic one and that therefore the strikers were not entitled to reinstatement to jobs that had been filled while they were on strike. The Board reversed this finding and held that the strike was at least in part a result of the Company's refusal to bargain in good faith, and thus an unfair labor practice strike entitling the strikers to reinstatement and back pay. *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333 (1938). The majority agrees with the Board, more fully buttressing the Board's conclusion that the strike was motivated by the Company's refusal to bargain in good faith. Since I am of the opinion that the Company in fact did bargain in good faith, I would hold the strike to be economic in nature and the strikers not entitled to reinstatement. *NLRB* v. *W. Is Rice Co.*, 288 F. 2d 511 (5th Cir. 1961); *NLRB* v. *Jones Thompson & Co.*, 208 F. 2d 743, 749 (2d Cir. 1953); *NLRB* v. *Scott & Scott*, 245 F. 2d 926 (9th Cir. 1957); *Winter Gardens Citrus Products Cooperative* v. *NLRB*, 238 F. 2d 128 (5th Cir. 1956); *NLRB* v. *Brashear Freight Line, Inc.*, 119 F. 2d 379 (8th Cir. 1941).

III. Coercive Statements

I concur with the majority's determination that the remarks of General Manager Clark to employees Peacock and Clemons were not coercive. The majority, however, accepts the Board's finding that the statements of Foreman McDowell were in violation of § 8(a)(1). The Board's finding was predicated on its conclusion that "In view of the Respondent's other violations, as set forth herein, these statements were neither isolated nor minor." As I would agree with the Trial Examiner that there were no other violations, I would reinstate his finding that these statements were trivial and insignificant.

I would deny enforcement and set aside the Board's order.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Nos. 27422, 27224, 27318

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

FITZGERALD MILLS CORPORATION,
Respondent.

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

FITZGERALD MILLS CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Decree

Before: CLARK, MOORE and SMITH, Circuit Judges.

THIS CAUSE came on to be heard upon the petitions of Textile Workers Union of America, AFL-CIO, and Fitzgerald Mills Corporation, to review and set aside an order

of the National Labor Relations Board issued against Fitzgerald Mills Corporation, its officers, agents, successors and assigns on October 11, 1961, and upon the Board's cross-petition for enforcement of said order. This Court heard argument of respective Counsel on October 11, 1962, and has considered the briefs and transcript of record filed in this cause. On January 9, 1963, the Court, being fully advised in the premises, handed down its decision denying the petitions for review and granting enforcement of the Board's order in full.

On Consideration Whereof, it is ordered, adjudged and decreed by the United States Court of Appeals for the Second Circuit that the said order of the National Labor Relations Board in said proceeding be enforced and that Fitzgerald Mills Corporation, its officers, agents, successors and assigns, abide by and perform the directions of the Board in said order contained.

Charles E. Clark
Judge, United States Court
of Appeals for the Second Circuit

J. Joseph Smith
Judge, United States Court
of Appeals for the Second Circuit

Filed: February 8, 1963

Decision and Order.

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

FITZGERALD MILLS CORPORATION,

and

LOCAL 1252, TEXTILE WORKERS UNION OF AMERICA, AFL-CIO, and TEXTILE WORKERS UNION OF AMERICA, AFL-CIO.[1]

Case No. 10-CA-4176.

On June 29, 1960, Trial Examiner Lee J. Best issued his Intermediate Report in this proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the copy of the Intermediate Report and Recommended Order attached hereto. Thereafter, the Union and the General Counsel filed timely exceptions thereto and supporting briefs.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions, the briefs, and the entire record in the case,

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[1] The name of the charging party is hereby amended to reflect the amendment, granted at the hearing without objection, naming the International and Local 1252 as the joint charging party. The International and Local 1252 are hereinafter referred to jointly as the Union.

and finds merit in the exceptions as set forth below. Accordingly, the Board adopts the findings of the Trial Examiner only to the extent they are consistent herewith.

1. The complaint, as amended at the hearing, alleges that the Respondent refused to bargain collectively with the Union beginning on or about January 20, 1959. The Trial Examiner concluded that the Respondent conferred in good faith at all times. We accept all credibility resolutions made by the Trial Examiner, except as set forth in paragraph 2, below, and the facts as found in the Intermediate Report. Based thereon and on other undenied testimony in the record as recited below, we find, contrary to the Trial Examiner, that the Respondent's whole course of dealing with the Union clearly demonstrates that it engaged in mere "surface bargaining."[2] In so finding, we rely particularly on the following evidence of the Respondent's bad faith:

(a) *The Respondent's dilatory tactics.* Beginning in the fall of 1958,[3] the Respondent clearly displayed a dilatory attitude and reluctance to supply information requested by the Union which was essential to the administration of the then existing contract and the negotiation of a new contract. Thus, the Union made its request for wage information near the end of September 1958; received incomplete information on January 19, 1959; and did not receive a satisfactory incentive pay schedule until March 6, 1959, long after the demand and the Union's no-

[2] *N. L. R. B. v. Herman Sausage Company, Inc.*, 275 F. 2d 229 (CA 5), enf'g. 122 NLRB 168; rehearing denied 277 F. 2d 794.

[3] To the extent any of the incidents occurred prior to the 6-month limitation period of Section 10(b), which runs from December 29, 1958, they are relied on solely as background information to shed light upon events within the period covered by the charge. *Watertown Paper Milk Co.*, 127 NLRB 1101, 1102.

tice to the Respondent on January 20, 1959, that it desired to negotiate a new contract. The Respondent's attitude in November, 1958, with respect to supplying wage information is apparent from the fact that Clark, the Respondent's General Manager, replied to the Union's request for "social security earnings" of employees by saying that they were busy trying to run a plant and could not furnish the information.[4] Job descriptions requested at the same time were not forthcoming until January 19, 1959, at which time the Respondent supplied those that were available, but no additional job descriptions have ever been transmitted.[5] Moreover, in September 1958, the Union objected to the Respondent's previously having revised its insurance benefits plan by unilateral action and requested a copy of the plan. In response thereto and to at least one subsequent request by the Union, Clark took the position that a copy had been supplied to the previously assigned representative of the Union and the Union was therefore in possession of the information. Clark said that he would nevertheless furnish a copy to Botelho. However, this copy was not forthcoming until June 1, 1961, during the course of the strike. And at the hearing, Clark admitted that the former union representative had not received a copy. It is also clear that a seniority roster, requested in September 1958, was never furnished. We find that the dilatory tactics of the Respondent are clearly established in the record. Such tac-

[4] This finding is based on the uncontradicted testimony of Botelho, the Union's Regional Director.

[5] The testimony is in dispute as to whether any additional requests were made for this information prior to June 1, 1959, and the Trial Examiner made no finding as to this. However, in view of the undenied fact that the Union's request for increased insurance benefits was discussed during the course of negotiations in April, it seems to us unlikely that the need for the information was not raised again during this period.

ties are inconsistent with its obligation to supply the Union with proper information without undue delay.[6]

(b) *The nature of Respondent's counterproposal and its adamant refusal to enter a contract with the Union except on its own terms.* The Union's proposal sought a considerable number of changes in the prior contract, including substantial increases in economic benefits. The Respondent's counterproposal was essentially the expiring contract, with certain changes desired by the Respondent[7] and the deletion of a substantial number of provisions which contained benefits previously enjoyed by the employees.[8] As a result, the counterproposal constituted such a radical departure from the previous contract as to be predictably unacceptable to the Union.[9] It is abundantly clear, both from the Intermediate Report and from the record, that the Union, in effect, put aside its own proposal and that all discussion at the negotia-

[6] *Butcher Boy Refrigerator Door Company*, 127 NLRB 1360, 1362.

[7] *E.g.*, at arbitration hearings, the parties could present "evidence and argument" rather than "evidence, argument and other pertinent material"; as formerly, the time within which the Company must act at various steps in the grievance procedure was lengthened; and workload disputes were removed from the regular arbitration procedure.

[8] For example, the check-off clause was omitted; the no-strike clause omitted the provision saving the Union, if it promptly disavowed any unauthorized work interruption and tried by all reasonable means to prevent or terminate it, from civil action under Section 301 of the Act; the Union's right to reopen wages for reexamination by comparison with area rates was deleted; determination of competence and qualification for retention or layoff purposes was left solely to the Company's judgment and apparently was removed from the grievance and arbitration procedure; jobs would remain temporary until designated as permanent by the Company; and the necessity for prior notice to the Union of contemplated changes in workload was eliminated.

[9] See *Herman Sausage Co., Inc., supra*; *N. L. R. B. v. Reed & Prince Manufacturing Co.*, 205 F. 2d 131, at 139 (CA 1), cert. denied 346 U. S. 887.

tion meetings was based upon the Respondent's counterproposals with the Union stating its position with respect to each provision. It is equally clear that the Union receded from its original position and made a great many progressively lesser requests but that the Respondent at all times maintained an uncompromising attitude, rejecting the Union's requests without explanation or discussion. Agreement reached on any provision was solely by reason of the Union's acceptance of the Respondent's proposal as it stood. The Respondent's representatives made no concessions prior to the strike, which began on May 11, except to state that they would *recommend* that a Union representative be permitted to enter the plant to investigate grievances and that the parties *might* be able to resolve two pending grievances.[10] And although there were apparently some concessions made during the negotiations on June 1 and July 1, it is clear that there was no real intent on the Respondent's part to reach agreement. This is evidenced by Clark's statements to the non-striking employees in the plant in May and June and the Respondent's insistence that the Union waive the

[10] Except for this statement as to the possible resolution of the two grievances, the Respondent consistently demanded a clause stating that the Union agreed that there were no grievances pending and that all grievances had been or were thereby dismissed, and deleting from the old contract the provision that any grievances arising during the contract term which had reached step 2 and had been put in writing, should be completed even after the expiration of the contract term. It is well settled that the expiration of a bargaining agreement does not relieve a party of its obligation to process a pending grievance under the terms of the expired agreement. *Local 24, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO v. Oliver*, 358 U.S. 283, 295-296; *Colonial Hill Manufacturing Co.*, 128 NLRB 1, 3-4, enf. denied on other grounds 291 F.2d 909 (C.A. 5); *Sheraton-Kimball Co.*, 132 NLRB 1628, 1629-1630, enf. denied on other grounds 304 F.2d 363 (C.A. 8); *Bethlehem Steel Co.*, 136 NLRB 1500, 1501-1502, enf. denied on other grounds 320 F.2d 615 (C.A. 2); *Nabors Trucking Co.*, 138 NLRB 1, 2-3, enf. denied on other grounds 318 F.2d 69 (C.A. 5); *Sinclair Refining Co.*, 140 NLRB 1, 2-3, enf. denied on other grounds 322 F.2d 913 (C.A. 10); *Bethlehem Steel Co.*, 142 NLRB 1, 2-3

strikers' right to reinstatement as a condition of entering a contract.

While an employer is not obligated to make any concession, it is required to make a reasonable effort to reach an agreement.[11] Failure to do little more than reject proposals is indicative of a failure to comply with the statutory requirement of good faith bargaining.[12] It is apparent from the above facts, considered in the context of the entire course of bargaining, that the Respondent in fact did virtually nothing more than reject the Union's proposals. At no time did it make a genuine effort to reconcile the differences between it and the Union, contrary to its obligation to approach the bargaining table with an open mind and, through the give and take of negotiations, to attempt to reach an agreement.[13]

(c) *The limited authority of Respondent's negotiators to accept only the Respondent's proposal contract.* Respondent's Attorney Prowell testified that he was authorized to depart from the Respondent's counterproposal except with respect to "money items." However, it is clear from the Intermediate Report and the record that he and other agents of Respondent were, in fact, never authorized to reach any agreement different from the original counterproposal without prior clearance with Horbitt, an official of Respondent with his office in Boston, Massachusetts. Thus Clark, Respondent's General Manager, testified that he talked with Horbitt after each meet-

[11] *Bonham Cotton Mills, Inc.*, 121 NLRB 1233, enf. 278 F. 2d 903 (CA 5).

[12] *M. Lean Arkansas Lumber Company, Inc.*, 101 NLRB 1022, 1034, and cases cited therein.

[13] *Pittsburgh Television, Inc.*, 131 NLRB 1113, [illegible] *Company, Inc., et al.*, 125 NLRB [illegible] *Herman Sausage Co., Inc., et al. v. N. L. R. B.*, [illegible] *pany v. N. L. R. B.*, [illegible] *cf. N. L. R. B. v. American National Insurance Company*, 343 U. S. 395

ing. And as found by the Trial Examiner, the Union was told after each meeting that the matters discussed would have to be or were in fact taken up with higher management. Moreover, the only meetings at which substantial discussion took place prior to the strike on May 11, were those of April 10 and April 24. But, as the Trial Examiner found, on April 10 Attorney Constangy, during the informal morning conference, advised Botello that decisions with respect to wages, arbitration, and checkoff had been made by higher management and could not be changed locally, and Attorney Prowell, during the formal afternoon meeting, made it clear that questions raised by the Union must be submitted for consideration to Constangy and higher officials of the Respondent.[14] In fact, Prowell testified that he was present at that meeting only for the purpose of having Botello explain the Union's position on the Respondent's proposal. And it is clear that at the April 24 meeting, Prowell in fact refused to deviate from the Respondent's counterproposal and merely stated that he would *recommend* that a Union representative to be permitted access to the plant to investigate grievances. While the absence of competent authority of a bargaining representative to enter into a binding agreement is not necessarily indicative of bad faith,[15] the character of the agent's powers is a factor to be given consideration.[16] We find that the limitations imposed by the Respondent in the instant case, including its predetermined position concerning union security and "money items,"[16a] particularly when considered in the entire con-

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[14] See, *e.g.*, *Capital Ingot Co.*, 106 NLRB 169; *McLean Arkansas Lumber Co.*, 109 NLRB 1022, 1048; *Floyd A. Fry Roofing Company v. N. L. R. B.*, 216 F. 2d 273 (CA 9).

[15] *Great Southern Trucking Company v. N. L. R. B.*, 127 F. 2d 180 at 185 (CA 4), cert. denied 317 U. S. 852. See also *Floyd A. Fry Roofing Company v. N. L. R. B.*, *supra*, at 275 and 276.

[16] *Dura Fibers, Inc.*, 121 NLRB 477.

text of events before and during the strike, reveal that the Respondent did not bargain in good faith.[15]

(d) *The unilateral acts by the Respondent.* As set forth in the Intermediate Report the Respondent informed the Union at the negotiation meeting of April 19, 1939, that within the preceding 60 days it had changed the duties and wages of the forklift drivers. Hotelling also testified without contradiction that on June 1938, while the strike was in progress and during the course of bargaining, the Respondent changed the wage rate of the work load of loomfixers without consulting the Union. It is clear that both incidents occurred at a time when the parties were in the course of negotiations, that the Union protested the Respondent's actions and was willing to continue negotiations, and that there was no impasse.[16]

In addition, we find that no genuine impasse was reached on May 7, 1939, in view of the Respondent's bad faith bargaining as revealed by its entire course of conduct during the negotiations. Therefore, the Respondent's unilateral institution of its wage increase effective May 11, 1939, was not privileged and is further evidence of the Respondent's bad faith.[17]

(e) *The Respondent's refusals to discharge employees on April 6, 17, and 24.* Contrary to the Trial Examiner, we

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[15] *Herman Sausage Co., Inc.*, 122 NLRB 168, 170; *Great Southern Trucking Company v. N. L. R. B.*, supra; *N. L. R. B. v. Martin Brothers Box Company*, 130 F. 2d 202, 207-208 (CA 7), cert. denied 317 U. S. 690.

[16] *Herman Sausage Co., Inc.*, 122 NLRB 168, 170-171, enf'd 279 F. 2d 229 (CA 5); *American National Insurance Co. v. N. L. R. B.*, 187 F. 2d 307, at 309 (CA 5), enf'g as to NLRB 188, affirmed 342 U. S. 395. And see *Dalton Brick & Tile Corporation*, 120 NLRB 473 at 486-487.

[17] See *N. L. R. B. v. Crown Laundry Company*, 175 F. 2d 130, at 136 (CA 9), enf'g 76 NLRB 303, cert. denied 338 U. S. 827, rehrg. denied 338 U. S. 882.

find that the Respondent's notices to its employees were designed to undermine the Union and, hence, are additional evidence of its failure to bargain in good faith. While an employer may report to its employees the history of the negotiations with their representative, the cases so holding are clearly distinguishable from the situation here in that none of them involved reports which in their context and in the context of events were shown to be unlawfully motivated.[3] In contrast, here the form and timing of the notices were clearly calculated to inform the employees not only that the Respondent alone was entitled to credit for the increase, but that the Respondent intended to offer the Union no more than the Respondent had already unilaterally determined to grant, without reference to the collective bargaining process. Thus, the notices appear to emphasize the need for the Union's agreement to the proposed effective date rather than the amount. In addition, the proposed wage schedule posted on April 13 was clearly misleading in that it appeared to be an across the board increase and would be so interpreted by the employees. But the facts were, in fact, expected earnings under the incentive system and individual

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[3] *Continental Box System, Inc.*, 128 NLRB 384, (respondent organized in good faith throughout, and letters were sent during a subsequent strike which were complete copies of all material simultaneously mailed to the Union); *Blackstone Mills, Inc.*, 101 NLRB 772, 781 (during a negotiating meeting at which the respondent's proposal was made, respondent began distribution of a written statement of its proposal and the reasons for its position, in which it also recited that the employees should attend the next union meeting to advise their committee as to their feelings toward these adjustments); *The Stanley Works*, 108 NLRB 737, 741-743 (noted that a seasonal wage could not be paid, followed by a substantial number of negotiation meetings during which the latter was discussed in the course of good faith bargaining); *A. H. Cox & Co.*, 101 NLRB 148, 148-9 (respondent's letters to employees set forth the bargaining impasse which existed, reported the offer made by respondent, the union's demands,

Footnote continued on following page

employees might or might not receive an increase under the proposed plan.

Moreover, the Respondent's conduct in announcing April 27, 1959, to its employees, in its April 13 notice, as the proposed effective date for the wage increase further evidences the Respondent's objective. As found by the Trial Examiner, at the negotiation meeting of March 23, 1959, Botelho requested that any wage increase be retroactive to the expiration date of the old contract, and Respondent's attorney, Constangy, proposed that this matter be left open for further negotiation. Nevertheless, Respondent, without consultation with the Union, fixed April 27 as its proposed effective date, announced that proposed date to its employees, and thereafter refused to discuss any other possible effective date. The impression that Respondent deserved solo credit for the increase and the fact that this was intended is emphasized by Foreman

(Footnote continued from preceding page)

and the respondent's inability to meet those demands"; *Lucas Manufacturing Company*, 94 NLRB 1214, 1225 (two letters to employees reporting the positions taken by the respondent during the bargaining and explained that it could not then afford to increase wages because of its business position and "there is nothing to indicate that they were attempts to undermine the prestige of the union"); *United Wholesale Company*, 72 NLRB 554, 555 (the respondent bargained in good faith throughout, and the sole allegation involved letters sent to the employees after many bargaining sessions, which explained the respondent's position on the union's wage demands and why it could not meet them, and repeatedly urged the employees to continue bargaining through the union as their representative); *Ox Terra Foundries, Inc.*, 101 NLRB 1642, 1670 (where the suggestion was rejected that speeches to employees announcing unilaterally determined wage increases which would be given if the union agreed, and other speeches stating the respondent's position on issues before the bargaining conference amounted to individual bargaining with the employees, but where there was apparently no contention that these speeches were attempts to undermine the union and evidenced respondent's bad faith bargaining and therefore no finding was made thereon,

McDowell's statement to employee Woodard shortly after the posting of the April 13 notice to the effect that the Union could not get a larger pay raise than the Company was offering.

The Respondent's objective is also clearly revealed by the circumstances surrounding the posting of the April 24th notice. The Trial Examiner found that at the meeting on that date the Union protested the posting of the April 13th notice, and it is undisputed that because of the protest the parties agreed upon the language of a notice which was to clarify the status of negotiations. Notwithstanding this, the Respondent's general manager, immediately upon the conclusion of the meeting, telephoned his office and had the April 24th notice posted in essentially the utterance to which the Union had objected. But the agreed upon notice was not posted until April 27. It seems clear that if Respondent's motive were merely to inform the employees of the status of negotiations, the General Manager would have communicated the agreed text to his office in his telephone call in order to have it posted as soon as possible.

In these circumstances, we find no difficulty in concluding that the Respondent's object in posting its notices was not merely to keep its employees informed but, rather, to subvert the Union.

(f) *Clark's statements in May and June, 1959.* As set forth in the Intermediate Report, Clark, during the course of the strike, made speeches to the non-striking employees in the plant, during which he said, *inter alia*, that he would not sign a contract with the Union unless it agreed to his terms. These statements clearly reveal that the Respondent was not meeting with the Union with an open mind and an intention to reach agreement.

(g) *The Respondent's proposal of July 10, 1959, concerning the rights of the strikers.* It is clear, as the Trial Examiner found, that at the meeting on July 10 Respondent's Attorney Prowell insisted that before any contract could then be negotiated, the Union would have to agree to the Respondent's proposal with respect to strikers, and that as a result negotiations ceased. The provision demanded by the Respondent would have required that the Union waive the reinstatement rights of the strikers and was tantamount to insistence that the Union abandon its unfair labor practice charges in order to finalize a bargaining agreement. As we find, *supra*, that the strike was caused by the Respondent's refusal to bargain in good faith and was hence an unfair labor practice strike from its inception, all strikers were entitled to full reinstatement upon application. It is well settled that a Union can not waive the reinstatement rights of strikers,[21] and the demand for such a waiver constitutes bad faith bargaining in violation of Section 8(a)(5). The conditioning of further bargaining upon the acceptance of this provision was an unlawful condition precedent, at variance with the Respondent's obligation to bargain with the Union in good faith and is also violative of Section 8 (a)(5).[22] The Respondent's raising this demand after the termination of the strike further demonstrates its intention to avoid reaching agreement.

It is clear from all these facts that the Respondent did not approach the bargaining table with an open mind and sincere desire to reach agreement, but, rather, had a predetermined intent so not to do so. Accordingly, we find that the Respondent failed to bargain in good faith with the

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[21] *Reader Manufacturing Co.*, 99 NLRB 1185, 1189. See *Erie Resistor Corporation*, 122 NLRB No. 51, p. 15, fn. 31.

[22] *Erie Resistor Corporation*, *supra*, fn. 15.

Union and thereby violated Section 8 (a)(5) and (1) of the Act.

2. We further find, contrary to the Trial Examiner, that Foreman McDowell's statements to employee Mildred Woodard shortly after April 13[23] and in November, 1959,[24] were coercive and constituted independent violations of Section 8 (a)(1) of the Act. In view of the Respondent's other violations, as set forth herein, these statements were neither isolated nor minor.

The Trial Examiner credited Clark's version of what he said to the pickets on May 22, 1959, "because it is more consistent with past and subsequent negotiations between the parties." This conclusion was reached in the context of the Trial Examiner's findings that the Respondent bargained in good faith at all times. It is the Board's established policy not to overrule a Trial Examiner's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that the resolutions were incorrect.[25] In the instant case we have rejected the Trial Examiner's findings as to the Respondent's good faith in its bargaining with the Union and have found, instead, that the record clearly establishes its bad faith throughout the negotiations. As the Trial Examiner's reason for crediting Clark's testimony as to the May 22,

[23] At this time McDowell said that he did not think the Union could get a larger pay raise than the Company was offering and if the employees wanted to keep their jobs they had better just leave the Union alone.

[24] When Woodard requested additional work, McDowell said that if she had not walked out she would have a regular job on the first or second shift; that he could have told her that, and in fact tried to do so, after she became a member of the Union.

[25] *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F. 2d 362 (CA 3).

events thus falls, his credibility finding on this matter must also fall.[26] The Trial Examiner has given no other reason for discrediting the General Counsel's witnesses, each of whom has corroborated the others as to these events, and we are convinced that the clear preponderance of all the relevant evidence establishes that Clark's version cannot be credited. We therefore accept the corroborated testimony of the General Counsel's witnesses.[27]

Accordingly, we find that during the late afternoon of May 22, 1959, Clark, in a conversation with certain pickets on the picket line, solicited the strikers to abandon the Union and go back to work, suggested that the employees get a union of their own and if it did not go well they could reaffiliate with the charging Union, and told the strikers that he would "die and go to hell" before he would sign a contract with the Union. We further find that by these statements the Respondent interfered with, restrained, and coerced its employees in the exercise of their rights under Section 7 of the Act and that it thereby violated Section 8 (a)(1) of the Act.

All of the conduct which we have found violated Section 8 (a)(1) further reveals the Respondent's bad faith and is additional evidence supporting our finding that the Respondent violated Section 8 (a)(5).

3. The Trial Examiner concluded that the strike was called by the Union to bring economic pressure to bear to force "further concessions" with respect to its demands and therefore was economic at its inception. We do not

[26] *Cf. Combined Metal Wks. Corp.*, 123 NLRB 959, 961.

[27] See *Erie Dry Goods Company*, 117 NLRB 815, 817. We, however, we hereby affirm the other credibility resolutions by the Trial Examiner, as we are not convinced that they are resolutions of the clear preponderance of the evidence.

agree. Rather, we find that the strike was the result of the Respondent's failure to bargain in good faith and was an unfair labor practice strike at all times. There is clear evidence which reveals that the cessation of work was the result of the Respondent's conduct. Thus, the Union's telegram to Horbjit on May 7 informed him that a strike would be recommended because of the position taken by the Respondent's negotiators. Horbjit's letter's notice to the employees calling the meeting at which the strike vote was taken refers to the Respondent's intransigent position throughout the negotiations. Also it is undisputed that at that Union meeting Horbjit reported in some detail on the events of each negotiating meeting, told the employees that "it was becoming increasingly apparent to [him] that the Company did not want to bargain with this Union in good faith," and recommended strike action for this reason. Further, the Union's May 12 letter to the employees explaining its position points to the Respondent's unreasonable contract proposals, intransigent position, and bad faith bargaining attitude. Moreover, the Union could hardly have been seeking "further concessions" in view of the absence of any concessions by the Respondent up to that time.

4. The Trial Examiner found that the Respondent did not violate Section 8 (a)(3) and (1) of the Act by denying reinstatement by strikers when they offered to return to work or by reinstating some of the strikers without their full seniority, because he found that they were economic strikers who were permanently replaced. We find merit in the exceptions to this conclusion.

The record establishes, and we have found, that the employees went out on strike in protest to the Respondent's bad faith bargaining. For this reason they became unfair labor practice strikers who, under established law, were

entitled to reinstatement to their jobs upon unconditional application, regardless of whether or not they had been replaced.[28] It is undisputed that on or about July 7 and 8, 1959, most of the strikers made such an unconditional application. Moreover, we find that Union Attorney Goldthwaite's letter of July 15, 1959, was an unconditional offer to return to work made on behalf of all the strikers.

In addition, it is admitted that, as the Trial Examiner states, all strikers were required to make application as new employees. Such a requirement is clearly improper as to employees entitled to reinstatement and itself constitutes discrimination in violation of Section 8 (a)(3) of the Act.[29]

Accordingly, we find that the Respondent discriminated against those strikers who were denied reinstatement on their unconditional application and those who were reinstated without their full seniority or other rights and privileges, in violation of Section 8 (a)(3) and (1) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

It has been found that the Respondent refused to bargain in good faith with the Union that represented a majority of the employees in an appropriate unit. Accordingly, we shall order the Respondent, upon request,

[28] *N. L. R. B. v. National Steel Shops*, 212 F. 2d 791 (CA 6).

[29] See *Case Robinson Freight Lines*, 114 NLRB 1063, 1066, enf'd 251 F. 2d 639 (CA 6).

to bargain with the Union as the exclusive representative of the employees in the appropriate unit.

We have also found that the Respondent discriminatorily denied reinstatement to certain unfair labor practice strikers. The record reveals that some of those strikers have returned to work for the Respondent, but it is not clear whether they were reinstated to the same or substantially equivalent employment. It also appears that certain of the returned strikers have not been credited with their former seniority and may have been denied other rights and privileges. Accordingly, we shall order the Respondent to offer the employees named in Appendix A, attached hereto,[30] immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, discharging, if necessary, any replacements in order to provide work for such strikers. We shall also direct the Respondent to reimburse the foregoing employees for any loss of pay they may have suffered by reason of the Respondent's discrimination against them by paying to each of these employees a sum of money equal to the amount that he normally would have earned as wages from the date of his unconditional application for reinstatement to the date of the Respondent's offer of reinstatement, less his net earnings during said period, leaving for the compliance stage of the proceeding the determination of the adequacy of the reinstatement of those already returned to work. The amount of back pay due shall be computed according to Board policy set forth in *F. W. Woolworth Company*, 90 NLRB 289. Payroll and other records in possession

[30] The charge and complaint allege discriminatory treatment of 159 strikers. Accordingly, we shall limit our remedial order to those so named.

of the Respondent are to be made available to the Board or its agents, to assist in such computation and in determining the right to reinstatement. Because the Trial Examiner recommended dismissal of the complaint, and in accordance with Board practice, we exclude from the above period the time from the date of the Intermediate Report to the date of the Order herein in computing the amount of back pay to which each employee is entitled.

In view of our findings concerning the Respondent's refusal to bargain, its discrimination against the strikers, and its coercive statements, a potential threat of future violations exists which requires the inclusion of a broad cease and desist provision in our Order.

CONCLUSIONS OF LAW

1. The Respondent, Fitzgerald Mills Corporation, is engaged in commerce within the meaning of the Act.

2. Local 252, Textile Workers Union of America, AFL-CIO, and Textile Workers Union of America, AFL-CIO, are labor organizations within the meaning of Section 2 (5) of the Act.

3. All production and maintenance employees at Respondent's plant at Fitzgerald, Georgia, excluding office clericals, professional and technical employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

4. Textile Workers Union of America, AFL-CIO, at all times material hereto, has been and still is the exclusive representative of all the employees in the aforesaid unit for the purposes of collective bargaining within the meaning of Section 9 (a) of the Act.

5. By refusing to bargain collectively in good faith with the aforesaid labor organization as the exclusive representative of its employees in an appropriate unit, and by insisting as a condition of entering a contract that the Union agree to waive the reinstatement rights of the strikers, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (5) and (1) of the Act.

6. The strike beginning on May 14, 1959, was at all times an unfair labor practice strike.

7. By denying reinstatement to the strikers upon their unconditional application and by returning some strikers to work without their former seniority or other rights and privileges, the Respondent has discriminated in regard to the hire and tenure of employment of its employees, thereby discouraging membership in the Union, and has violated Section 8 (a) (3) and (1) of the Act.

8. By making coercive statements and soliciting strikers to abandon the Union, the Respondent interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, and has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Fitzgerald Mills Corporation, Fitzgerald, Georgia, its officers, agents, successors, and assigns, shall:

Decision and Order.

1. Cease and desist from:

(a) Refusing to bargain in good faith concerning rates of pay, wages, hours of employment, or other conditions of employment with Textile Workers Union of America, AFL-CIO, as the exclusive representative of all production and maintenance employees at its Fitzgerald, Georgia, plant, excluding office clericals, professional and technical employees, guards, and supervisors as defined in the Act.

(b) Discouraging membership in Textile Workers Union of America, AFL-CIO, or in any other labor organization, by discharging, refusing to reinstate, or otherwise discriminating against employees in regard to their hire or tenure of employment or any term or condition of employment.

(c) Threatening employees with economic reprisals if they support the Union, soliciting employees to abandon the Union, and indicating that it will not sign a contract with the Union.

(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist the aboye-named Union, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively in good faith with Textile Workers Union of America, AFL-CIO, as the exclusive representative of all production and maintenance

employees of the Respondent at its Fitzgerald, Georgia, plant, excluding office clericals, professional and technical employees, guards, and supervisors as defined in the Act, with respect to rates of pay, wages, hours of employment or other conditions of employment, and if an understanding is reached, embody such understanding in a signed written agreement;

(b) Offer to the employees named in Appendix A, attached hereto, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges;

(c) Make whole the said employees, in the manner set forth in the section entitled The Remedy, for any loss of pay each may have suffered by reason of the Respondent's discrimination against him;

(d) Upon request, make available to the Board, or its agents for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amounts of back pay due under the terms of this Order;

(e) Post at its plant in Fitzgerald, Georgia, copies of the notice attached hereto, marked Appendix B.[31] Copies of said notice, to be furnished by the Regional Director for the Tenth Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and maintained by it for a period of at least sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices

[31] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted before the words, "Decision and Order," the words "Decree of the United States Court of Appeals Enforcing."

to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced, or covered by any other material;

(f) Notify the Regional Director for the Tenth Region in writing within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

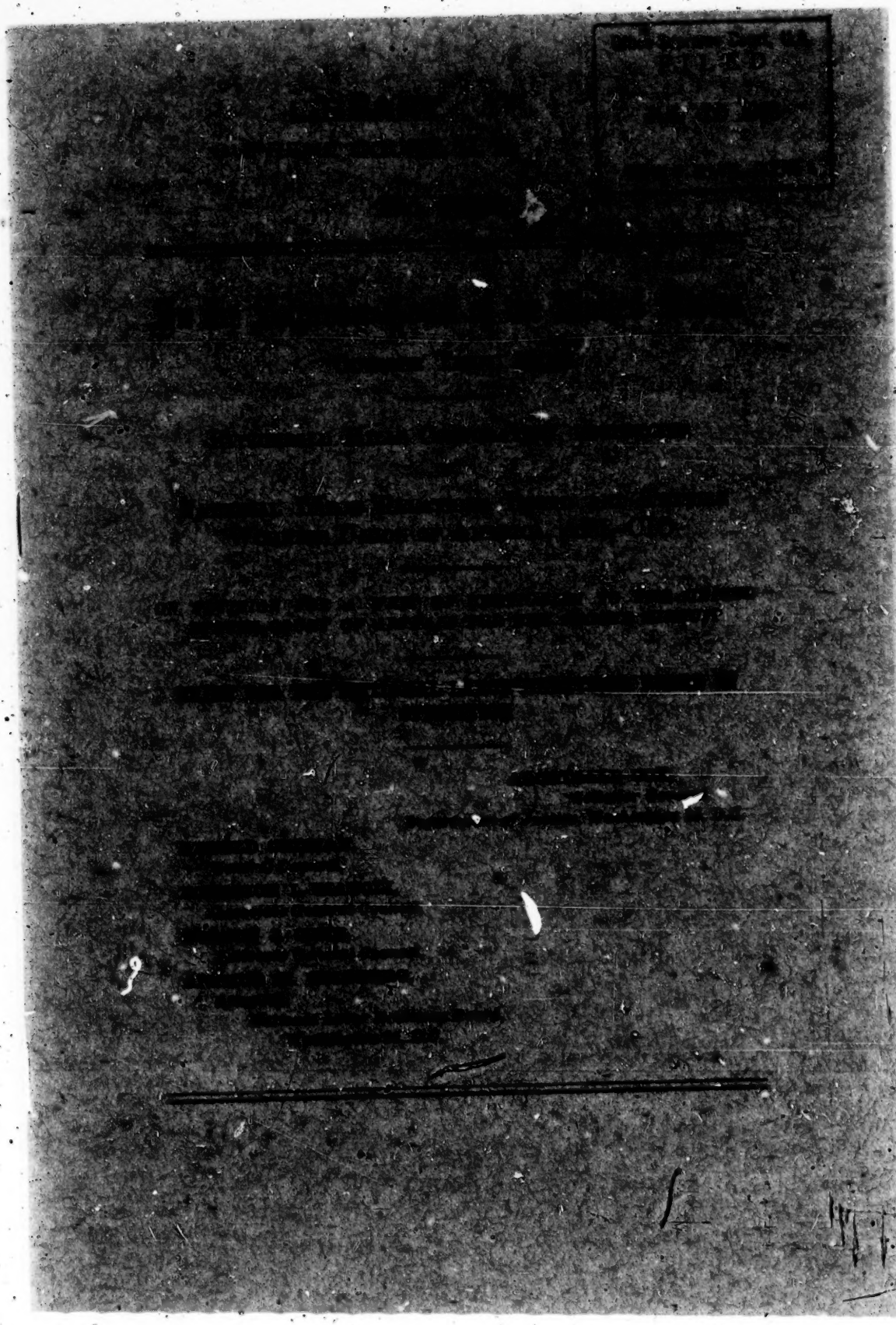
Dated, Washington, D. C., October 11, 1961.

FRANK W. MCCULLOCH,
Chairman.

BOYD LEEDOM,
Member.

GERALD A. BROWN,
Member.

(SEAL) NATIONAL LABOR RELATIONS BOARD.



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Statute:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*):

Section 8(a)(1), (3) and (5)	14, 15, 16

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 1109

FITZGERALD MILLS CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND TEXTILE WORKERS UNION OF AMERICA, AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 21–43) is reported at 313 F. 2d 260. The findings of fact, conclusions of law and order of the Board (J.A. 727–754)[1] are reported at 133 NLRB 877.

JURISDICTION

The decree of the court of appeals (Pet. 44–45) was entered on February 8, 1963, and a petition for rehearing *en banc*, filed by petitioner, was denied on

[1] "J.A." references are to the Joint Appendix printed for the use of the court below and filed with the petition; reference preceding a semicolon are to the Board's findings, and succeeding references are to the supporting evidence.

February 25, 1963 (Pet. 2). The petition for writ of certiorari was filed on May 17, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's finding that the petitioner refused to bargain in good faith with the collective bargaining agent of its employees.

2. Whether the court of appeals was required to remand the case to the Board when it rejected certain of the Board's subsidiary findings.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth at pp. 18–19 of the petition.

STATEMENT

I.

THE BOARD'S FINDINGS OF FACT

A. PETITIONER'S DILATORY TACTICS AND REFUSAL TO FURNISH REQUESTED INFORMATION

Petitioner operates a cotton mill in Georgia for the manufacture and sale of textiles (J.A. 756). The Union has been exclusive bargaining representative of petitioner Company's employees since 1952 (J.A. 757; 460, 4). The latest contract between the parties was executed March 25, 1957, and was subject to termination on March 25, 1959, upon sixty days' notice by either party (J.A. 757; 561, 577–578).

In the fall of 1958, the Union requested information from the Company relevant to the administration of the existing contract and the negotiations of a new agreement (J.A. 728, 757–758, 9–10, 5, 94). By letter dated September 23, 1958, the Union complained of the Company's failure to supply wage information, job descriptions and a seniority roster; of workload changes made without negotiation; of unilateral change in insurance benefits; of failure to comply with an arbitration award; and of failure to advise the Union as to which jobs were temporary and which permanent (J.A. 757–758; 579–580). The Company agreed, on November 11, to furnish the information requested, as well as a copy of the new insurance policy and to negotiate all future workload changes. (J.A. 728–729, 758, 581–583). The letter stated that the requested wage rate and job description data were in preparation (*ibid.*). Late in November, the Union complained again of the Company's failure to supply any of the promised information and asked when it could be expected. E. O. Clark, the Company's general manager, replied he "didn't know, * * * because he was busy trying to run a mill and * * * couldn't be troubled with this extraneous business" (J.A. 729; 11–12). The Union also requested the "social security earnings" of "dollar twisters" (J.A. 729; 11).

The Union filed refusal to bargain charges with the Board in December, 1958, alleging as an unfair labor practice the Company's continued failure to supply the requested information (J.A. 759; 12–13, 585). An incomplete list of wage rates and job descriptions

was supplied by the Company on January 19, 1959, whereupon the Union withdrew its charge (J.A. 728–729, 758–759; 588, 13, 15).[2] However, on February 11, the Union pointed out the deficiencies in the data supplied and renewed its demand for complete information. At the same time it requested the social security earnings of incentive employees. On March 6, the Company furnished an earnings and hours schedule of the incentive employees and told the Union to make its own computation of their hourly earnings (J.A. 728, 759; 596–606).

As of January and February 1960, the time of the Board hearing herein, the Company had not supplied the additional job descriptions or the seniority roster requested in 1958 (J.A. 729; 93–94, 9, 274, 588). A copy of the unilaterally instituted insurance policy was furnished the Union on June 4, 1959, after the Union in bargaining sessions in April and again on June 1 had demanded increased benefits thereunder (J.A. 729, 789; 70, 252, 672–673, 65–67).

B. THE PRE-STRIKE BARGAINING

On January 20, 1959, the Union timely notified the company that it desired to terminate the 1957 contract and negotiate a new one (J.A. 759; 607). On March 2, 1959, the Union submitted its contract proposal wherein it sought, among other things, increased wages, liberalized vacation benefits and the institution of paid holidays (J.A. 730, 762; 616–641). At the same time the Union requested the Company to select

[2] The charge which forms the basis for the instant proceeding was filed on June 29, 1959 (J.A. 545).

a date to begin contract discussions (*ibid.*). On March 17, receiving no reply, the Union, by telegram, again asked for a conference date (J.A. 642, 15–16). A meeting was arranged for March 23, two days before expiration of the old agreement, to be held in the Atlanta office of Frank Constangy, the Company's attorney (J.A. 763; 16).

At the March 23 meeting, Constangy announced that the Company had not yet fully studied the Union's proposals and suggested a 30-day extension of the existing agreement to afford the Company an opportunity to prepare counterproposals (J.A. 763; 354, 343, 17). The Union agreed to this extension and its chief negotiator, Botelho, inquired as to the Company's position with respect to wages (J.A. 763; 17–18, 355). Constangy was noncommittal, but agreed the Company would submit a detailed wage proposal with its contract proposals (J.A. 763; 355). The Union insisted that any wage increase be retroactive to March 25 and Constangy replied that this was a matter to be negotiated (J.A. 763; 17, 355). Shortly thereafter, Constangy and General Manager Clark met with Mark Horblit, one of the Company's chief stockholders and a member of its executive committee, and drafted the Company's counterproposals (J.A. 763–764; 356, 463, 460, 20).

The Company's contract proposal, without a wage schedule,[3] was submitted to the Union on April 4 (J.A. 764; 645–646). Unlike the expiring agreement, this

[3] The proposal merely contained a general wage provision, limiting wages to the wage pattern in textile mills in South Georgia (J.A. 771; 652–653).

proposed contract omitted the checkoff of union dues; leaves of absence for union business; the right of the parties, upon mutual consent, to amend the contract; the requirement of notice to the Union of proposed workload changes; the right of the Union to reopen wages; the provision barring discrimination against the Union or its members; and the provision for processing of pending grievances past contract termination. In addition, the Company proposed to lengthen the grievance procedure, remove workload disputes from the regular arbitration procedure, and limit the material to be presented at arbitration hearings. Further, the Company contract proposal would have subjected the Union to civil suits for unauthorized work stoppages; vested the employer with sole power to determine employee competence and qualification for job retention or layoff; and, by specifying that all jobs remain temporary until designated permanent by the Company, gave the Company the right to abolish jobs without negotiation and in disregard of earned seniority (J.A. 730; 560–578, 646–660, 35–48).

On April 6, although it had not yet presented to the Union a specific wage proposal, the Company posted a notice on the plant bulletin board. It advised the employees that a wage increase would be paid April 27, and expressed the hope that the Union would agree so that there would be no delay of the increase beyond that date (J.A. 764–765; 661).

A negotiation meeting was scheduled for the afternoon of April 10. That morning, in response to Union objections to the Company's proposals on arbitration, its general wage provision, and the duration of

checkoff. Constangy remarked that the decision on these matters could not be changed locally but only by higher management and suggested a meeting with Horblit in Boston, Massachusetts (J.A. 733, 766–767; 356–359, 423–424). Constangy further suggested that the scheduled afternoon session be postponed, but, when the Union would not agree, he stated his law partner, M. A. Prowell, would replace him at the meeting (J.A. 766; 359, 380–381). Prowell testified he "was to participate in the meeting for the purpose of allowing Mr. Botelho [the chief Union negotiator] * * * to explain * * * the Union's position on the Company's proposals" (J.A. 766; 381).

That afternoon the Company presented its detailed wage proposal, and also revealed that within the preceding 60 days it had unilaterally changed the duties and wages of the forklift driver (J.A. 734, 767; 149, 240, 503, 359–360, 177–178, 489–490). Clark pointed out that the Company's wage proposal was not an across-the-board increase but was based on incentive earnings (J.A. 735, 767; 25, 360, 26, 382). Botelho reviewed the Union and Company contract proposals, stated the Union position with respect to each provision, and indicated Union acceptance of at least six or seven of the 19 provisions in the Company proposal (J.A. 767–768; 384–390, 379, 489–492). The meeting adjourned after Prowell, without accepting any Union proposal or offering to modify those of the Company, stated he would submit to his seniors, for their consideration, the issues raised by the Union (J.A. 767–768; 385–390, 489–491, 27–29, 178–179, 433–

437). As he did after all bargaining sessions, Clark then reported on the meeting to Horblit (J.A. 732; 462, 482).

On April 13, the Company posted a detailed wage schedule on the plant bulletin boards. The notice attached stated that the posted wage scale, which was intended to be put into effect April 27, had been presented to the Union on April 10, and that the Company hoped the Union would agree and not delay the increase (J.A. 735-736, 768; 684). Shortly thereafter, employee Woodward was told by Foreman McDowell that the Union could not get a larger pay increase for the employees than that offered by the Company, and that if the employees wanted to keep their jobs they had better leave the Union alone (J.A. 736, 739, 796; 286-287, 289-290).

About April 20, Botelho met with Horblit in Boston. Botelho reviewed the Company and Union proposals and pointed out the problems faced by the Union in negotiations (J.A. 769; 110-111, 20-21). He told Horblit that local management was not bargaining in good faith and asked him, as owner of the Company, to look into the matter (J.A. 769; 21). Horblit promised to consult with another member of the Company's executive committee and transmit through Constangy any change in bargaining attitude (J.A. 769; 22). On his return to Georgia, Botelho was advised by Constangy that no word had been received from Horblit. A second bargaining session was arranged for April 24, with Prowell again scheduled to replace Constangy (J.A. 769; 111-112, 22-23).

The April 24 meeting opened with Botelho denouncing, as an attempt to undermine the Union, the Company's April 13 announcement of the intended wage increase. After heated discussion, the Company agreed to post a notice acceptable to the Union (J.A. 770; 391, 466–467). During the meeting the Union agreed to accept certain provisions as proposed by the Company, to accept other provisions from the old agreement in lieu of those in the Company's contract proposal, modified or reduced certain of its demands, and suggested specific wage rates for various job categories. However, the Company negotiators would accept no substitutions for their proposals, rejected each Union offer, and would make no counterproposals or concessions other than to state they would recommend that the Union be given access to the mill to investigate grievances and that it might be possible to settle two pending grievances (J.A. 730–734, 770–772; 392–399, 372–373, 112–115, 493–495, 433–437, 42). The Union was told that its "counter proposals" would have to be submitted to Company "higher ups" for any modification (J.A. 732–733; 494, 134–135, 432–436, 372–373, 410, 462, 480–482, 412, 363–364, 151, 27–29, 32, 37, 49, 51). The parties agreed to meet again on May 7, and the old agreement was extended until May 10 (J.A. 773, 667, 400).

Before adjourning, the parties also agreed on the wording of a notice to be posted in the plant advising the employees of the current status of the bargaining on wages (J.A. 737, 773; 467–468, 668, 173). However, immediately after the meeting, Clark, in Prowell's presence, called the plant and ordered the

posting of a different notice, reading as follows (J.A. 774; 664, 401–402, 443, 468, 450):

> To Employees:
>
> The Company and Union Representatives met in contract negotiations today and the Union refused to agree to the Company's wage proposal. The Union insisted that negotiations on wages be continued and therefore, the wage increase will not be put into effect as of Monday, April 27, 1959.
>
> Fitzgerald Mills Corporation
> By: E. O. Clark

About May 5, Botelho telephoned Constangy who advised that he had discussed with Horblit the Union proposals of April 24 and that it was apparent the Company was not going to move from its position (J.A. 774–775; 51, 363). Constangy testified he told Botelho that "maybe the Company [would] change its position" if the Union demonstrated its strength by a successful strike (J.A. 374–375). Botelho then attempted to reach Horblit directly by telephone but was told Horblit was not available for discussion (J.A. 775, 50–51). On May 6, by telegram, Botelho asked Horblit to call before the bargaining conference set for the next day, but Horblit did not respond (J.A. 775; 669, 51–52).

The May 7 bargaining meeting was brief. Constangy announced that the Company would not deviate from its original proposal, and Botelho replied he had no choice but to recommend a strike (J.A. 775; 53, 364–365, 115–116). Constangy then stated the Company would put its wage proposal into effect

May 11, to which action the Union refused to agree (J.A. 775; 365, 116). Later the same day, May 7, the Company notified the employees of the failure to reach agreement on a new contract, and that the proposed wage scale would be effective "immediately." The increase went into effect as of Monday, May 11 (J.A. 734, 776–777; 671–672, 406–407). Botelho again wired Horblit explaining that the attitude of the Company's negotiators compelled the Union to recommend a strike, but that the Union continued to be available for negotiations (J.A. 775–776; 670, 53).

On Saturday, May 9, Botelho met with about 130 employees. He described the course of the negotiations and the preceding events, and concluded that, "it was becoming increasingly apparent * * * that the Company did not want to bargain * * * in good faith" (J.A. 741, 779–780; 59–63, 245–246, 203–204, 262, 54–55). The employees voted unanimously to strike, and picketing began the following Monday, May 11 (J.A. 789; 63, 204). On May 12, the Union sent a letter to the employees charging the Company with unreasonable contract demands, an adamant position, and a bad faith bargaining attitude (J.A. 780–787; 687–698).

C. THE STRIKE AND POST-STRIKE BARGAINING

On May 22, 1959, during the strike, Clark, in a heated conversation near the plant gate, told an assembled group of some 20 strikers "to get the Union agitating s-o-b's out of Fitzgerald." Clark urged the strikers "to get a union of your very own." He added that, if the strikers came back to work, it would

be without a contract as he would "die and go to hell before [signing] a contract" (J.A. 799–800; 167, 193, 195, 288, 292–294, 297–298, 300, 312–313, 317–318, 321, 323, 325). When asked whether he contemplated "doubling up" the workload, Clark admitted "he planned to take three jobs and make two out of them" (J.A. 799–800; 326).[4]

The work assignments and wages of loomfixers had been discussed at the bargaining meetings prior to the strike, but no agreement had been reached (J.A. 767, 772; 256, 398–399). In June, while the strike was on and negotiations were continuing (see *infra*), the Company unilaterally changed the wages and workloads of loomfixers (J.A. 734; 129).

Negotiating sessions were held on June 1, July 1 and 10, under the auspices of a Federal mediator (J.A. 787–794; 64, 71, 75, 184–186, 128, 206–207). By the end of the July 1 meeting, the Union had accepted 10 of the Company's 19 contract proposals and had offered to accept two other provisions from the expired agreement (J.A. 788–792; 128–134, 406–409). Further, the Union agreed to the Company's wage proposal but asked for an additional 5 cents per hour after six months; reduced its demand for paid holidays from six to two; agreed to the Company's insurance program and its workload clause if modified by protections from the same provision in the

[4] Moreover, on at least two occasions thereafter, Clark addressed the non-striking employees in the plant. He told them he would not sign a contract with the Union except on his terms and that he would resign "before some of the [strikers] come back" (J.A. 737, 801–802).

old contract; and indicated it would drop its demand for a checkoff clause if agreement were reached on the other provisions (*ibid.*).

On Monday, July 6, Prowell notified Botelho that the Company rejected the Union's July 1 proposals and would not yield from its original contract offer. Botelho stated that he intended to end the strike and have the strikers apply for reinstatement. Prowell replied that only about 21 jobs were available and the strikers would be hired for those positions in their order of application without regard to whether their jobs had been filled or not (J.A. 793; 86–89, 412, 137, 139).

Thereafter a number of strikers were rehired to jobs formerly held by other strikers (J.A. 742, 793; 520–526, 712–726). When most of the strikers unconditionally applied for reinstatement on July 7 or 8, they were told there were no openings and to renew their applications weekly as they would be regarded as new employees (J.A. 762, 793; 698–703, 725–726, 517). On July 15, the Union's attorney, on behalf of all the strikers, made an unconditional offer of return to their former jobs (J.A. 795; 677–678, 284).

At a final meeting on July 10, Prowell announced that most of the strikers had been permanently replaced, that the replacements had been assured they would not lose their jobs because of the seniority of returning strikers, and that before any contract could be negotiated the Union would have to agree that:

> 1. Those strikers who have been permanently replaced have no rights under this Contract.

> 2. Those strikers who were permanently replaced and have been placed on other available openings shall have their seniority rights under this contract for future vacancies.

Bote, who refused to accept this proposal, stating he would not "bargain a working man's rights away" (J.A. 794; 413-416, 698, 92, 139-142, 207, 232, 249, 279-282). Thereafter all negotiations ceased (J.A. 794; 207-208, 93, 91, 140, 144, 415-416).

When employee Mildred Woodward, a striker who had been reinstated to a part-time job after the strike, asked Foreman McDowell for additional work, he said, "If [she] had not walked out [she] would have a regular job." He added, "I could have told you that after you became a member of the union, in fact, I tried to" (J.A. 739, 796-797; 287-288, 290).

II

THE BOARD'S CONCLUSIONS AND ORDER

On the basis of the foregoing facts, the Board concluded that the Company refused to bargain in good faith with the Union, and thus violated Section 8(a) (5) and (1) of the Act. In reaching this conclusion, the Board relied upon: (1) the Company's dilatory tactics and refusal to supply the Union with information; (2) the Company's adamant refusal to consider anything but its own contract terms; (3) the limited authority granted to the Company's negotiators; (4) the Company's unilateral acts during negotiation; (5) the posting of notices in the plant calculated to subvert the Union; (6) General Manager Clark's statements to employees after the strike began; and (7) the conditioning of

further bargaining upon the Union's acceptance of the Company's proposal of July 10 concerning the reinstatement and seniority rights of strikers (J.A. 728–739). The Board further concluded that the strike was in protest over the Company's bad faith bargaining, and that the Company therefore violated Section 8(a) (3) and (1) of the Act by denying reinstatement to certain strikers upon their unconditional application and requiring them to apply as new employees, and by reinstating other strikers without full seniority and other rights and privileges (J.A. 740–742). Finally, the Board concluded that the Company violated Section 8(a)(1) of the Act by the coercive statements of General Manager Clark and Foreman McDowell to employees (J.A. 739–740).[1]

The Board ordered the Company to cease and desist from the unfair labor practices found. Affirmatively, the Board ordered the Company to bargain with the Union upon request, to offer the striking employees full and immediate reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges, to make them whole for any loss of wages suffered, and to post appropriate notices (J.A. 746–754).

ARGUMENT

I. The Board's finding that petitioner failed to bargain in good faith, in violation of Section 8(a)(5) and (1) of the Act, presents essentially a substantial

[1] The Board overruled the Trial Examiner who found the Company had bargained in good faith. The Board left the Trial Examiner's credibility findings undisturbed except in

evidence question. See *National Labor Relations Board* v. *American National Insurance Co.*, 343 U.S. 395, 409–410. The court of appeals, after a careful review of the record, determined that there was ample evidentiary support for the Board's finding (Pet. 21–34). Accordingly, no issue warranting review by this Court is presented. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490–491.

2. There is no merit to petitioner's contention (Pet. 11–15) that the court of appeals exceeded its reviewing authority because it failed to remand the case to the Board for reconsideration after rejecting certain findings upon which the Board had relied. As shown (*supra*, pp. 14–15), the Board's ultimate conclusion that petitioner had refused to bargain in good faith rested on six subsidiary findings—i.e., that petitioner (1) engaged in dilatory tactics; (2) adopted an intransigent attitude at the bargaining table; (3) gave its negotiators only limited authority; (4) took unilateral action; (5) posted notices which were designed to undermine the Union; and (6) made clear through the statements of General Manager Clark that it had no intention of reaching agreement with the Union.[6]

one minor respect, J.A. 728, 739–740), but drew different inferences from the credited evidence. In these circumstances, the Trial Examiner's findings are entitled to no special weight. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 493–496; *Federal Communications Commission* v. *Allentown Broadcasting Corp.*, 349 U.S. 358, 364.

[6] The Board also relied on the fact that the Company had insisted that the Union waive the reinstatement rights of the strikers (*supra*, p. 15). This condition was illegal only if the Company's other acts amounted to a refusal to bargain and the employees were thus unfair labor practice, rather than economic, strikers.

Each of these subsidiary findings in turn rested on a number of incidents which occurred preliminary to and during the bargaining negotiations. Although the court of appeals disagreed with the Board as to the correct interpretation or relevance of some of these incidents, it found that there was still enough evidence of illegal action to sustain, not only the Board's ultimate conclusion of bad faith bargaining, but also each of the subsidiary findings on which that conclusion was based.

Thus, to establish dilatory tactics, the Board relied on the Company's delays in furnishing wage and job descriptions, information on an employee insurance policy, and a seniority roster. The court of appeals, although disagreeing that there was an undue delay in furnishing the insurance and seniority information, agreed that there was an "unexplained delay to furnish even partial wage and job classification data" and concluded that this by itself was "substantial evidence" to support the Board's finding of dilatory tactics (Pet. 25-26). The Board's finding of Company intransigence in bargaining rested on the fact that it submitted a counterproposal which was harsher than the previous contract, and that it thereafter engaged in "surface bargaining" without any sincere desire to reach agreement. The court, although concluding that the terms of the counterproposal itself furnished no support for the Board's finding, agreed that the Company's conduct of the negotiations revealed that it had no intention of reaching agreement with the Union, and held that this furnished sufficient support for the Board's find-

ing of intransigence (Pet. 26–28). The Board's finding of unilateral action rested on the fact that the Company, while negotiations with the Union were pending, changed the wages and duties of the fork lift drivers and loomfixers and put into effect, on May 11, 1959, a general wage increase. The court, although dismissing the fork lift change as "insignificant," found that the general wage increase constituted "a deliberate attempt by the Company to deal individually with the employees, and convince them that all benefits would come from the Company's sole choice, thereby weakening the Union in its strike effort" (Pet. 30–31). Finally, the Board found that notices posted by the Company on April 6, 13 and 24 were designed to undermine the Union's prestige. The court, although rejecting the findings concerning the April 6 and 13 notices, concluded that the April 24 notice reflected an intent to subvert the Union and thus supported the Board's conclusion (Pet. 31).

Since the court of appeals, although disagreeing with the Board in certain respects, nevertheless found sufficient evidence of illegal action to support each of

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[1] Petitioner contends (Pet. 11) that the court erred in holding that the wage increase was violative of the Act, because it found, contrary to the Board, that an impasse had been reached in the bargaining. Although the court did state that "an impasse was reached on May 7" (Pet. 25), this was not a genuine impasse but one which resulted from the Company's bad faith bargaining up to that point. In short, the court's opinion is not inconsistent with the Board's finding (J.A. 734) "that no genuine impasse was reached on May 7, 1959, in view of the [Company's] bad faith bargaining." An impasse which results from a failure to fulfill the statutory obligation to bargain affords no justification for unilateral action.

the Board's subsidiary findings and its ultimate conclusion that the Company failed to bargain in good faith, it was clearly proper for the court to enforce the Board's order without remanding the case to the Board for additional findings. In these circumstances, a remand to the Board would be "a mere formality and a needless addition to an already overprolonged proceeding." *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 331 U.S. 416, 427.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

FITZGERALD MILLS CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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Argument

One would assume from the Solicitor General's detailed statement of the evidence on which the Labor Board relied that the Board's Decision and Order, not the decision of the Court below, is in issue here. Furthermore, it is, to say the least, startling, in a case presenting the question whether the Court of Appeals, after rejecting the principal findings on which the Labor Board relied, properly substituted new and different findings of its own, to find the Solicitor General including in his Statement to this Court "facts" that neither the Board nor the Court found[1] and "facts" that the Court below expressly rejected.[2]

Aside from this, the Solicitor General's Brief, in attempting to establish that the Court, while rejecting much

1. See Appendix A, *infra*
2. See Appendix B, *infra*

of the evidence on which the Board relied, found there was still enough evidence to sustain each of the Board's six subsidiary findings, takes great liberties with both the Board's findings and the Court's in an effort to make them seem to harmonize.

1. The Court, in fact, found that there was "substantial evidence" supporting *only one* of the Board's subsidiary findings, namely, that the Company delayed in supplying two, not four, items of information (one of the two items, job descriptions, was non-existent). (Pet. 25-26).

We quote below the Solicitor General's summaries of the Board's remaining "subsidiary findings" with our comments on the summaries.

2. The Petitioner "adopted an intransigent attitude at the bargaining table." (S. G. Br. p. 16). This summary is grossly misleading.

The Board itself headed this subsidiary finding, "*The nature of Respondent's counterproposal* and its adamant refusal to enter into a contract with the Union *except on its own terms*." (Emphasis supplied.) The Board then said the counterproposal was "predictably unacceptable." (Pet. 49). The Court held that the counterproposal was *not* "predictably unacceptable" and that "there was bargaining." (Pet. 26, 28). It substituted for the Board's finding one of its own, that the Company's "uncompromising attitude" in adhering to a *reasonable* counterproposal was evidence of bad faith. (Pet. 28).

3. The Petitioner "gave its negotiators only limited authority." (S. G. Br. p. 16). What the Board actually found was that the Petitioner limited the authority of its negotiators "to accept only the Respondent's (predictably unacceptable) proposed contract." (Pet. 50). The Court substituted for this finding one that the Petitioner's negotiators' having to refer some proposals to their principals (although "prior contracts had been negotiated on this kind of basis") created "inherent possibilities of delay"—but neither the Trial Examiner, the Board nor the Court found that this caused any actual delay. (Pet. 29-30).

4. The Petitioner "took unilateral action." (S. G. Br. p. 16). The Board found that the Petitioner granted wage increases to a fork-lift driver and loom-fixers without bargaining. (Pet. 53). The Court dismissed these findings as trivialities. (Pet. 30). The Board also found that a general wage increase that the Petitioner granted on May 9, 1959, was unlawful because no impasse had been reached. (Pet. 53). The Court held, without qualification, that "an impasse was reached on May 7." (Pet. 23).

The Solicitor General argues that the impasse that the Court flatly found existed was not a "genuine" impasse because the Petitioner had not bargained in good faith and that therefore the wage increase was not protected. (S. G. Br. p. 18). He then cites this wage increase as evidence of bad-faith bargaining. The Court below was guilty of no such circular reasoning. It substituted for the findings of the Board that it rejected, one of its own, contrary to *N.L.R.B.* v. *Katz*, 369 U. S. 736 (1962), that even in the presence of an impasse, the wage increase was unlawful (Pet. 31).

5. The Petitioner "posted notices which were designed to undermine the Union." (S. G. Br. p. 16). The Board held that three notices to employees that the Petitioner published impressed the employees "not only that the Respondent alone was entitled to credit for the increase, but that Respondent intended to offer the Union no more than the Respondent had already unilaterally determined to grant, without reference to the collective bargaining process." (Pet. 54).

The Court held two of the three notices were "not material." (Pet. 31). It condemned the third, not because it showed a disregard for the bargaining process, but because it placed on the Union "the onus of delay in making effective the proposed wage increase." (Pet. 31). The unlawfulness of such an alleged effort was never litigated before the Board or the Court.

6. The Petitioner "made clear through the statements of General Manager Clark that it had no intention of reach-

ing agreement with the Union." (S. G. Br. p. 16). The Court properly ignored this finding as evidence of a refusal to bargain.

Conclusion.

Thus, of six subsidiary findings, the Court rejected much of the evidence as to one (dilatory tactics), and ignored a second (Clark's statements). It rejected the remainder of the Board's subsidiary findings, and proceeded to make other and different findings of its own as to (i) the nature of the Petitioner's offer and its bargaining technique, (ii) the authority of the Petitioner's bargainers, (iii) the Petitioner's "unilateral action," and (iv) the notices to employees. Petitioner has had no opportunity to litigate these new basic issues. As well as the statute, simple justice demands that it have that opportunity.

This Court ought not to assume that the Board would still find a violation of Section 8(a)(5) solely on the basis of the "dilatory tactics" on which the Court upheld the Board only in minor part, or that the Board would concur with the Court on the Court's own "subsidiary findings" that, so far, have not been argued before the Board or the courts.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

Neither the Board nor the Court made any of the following "findings of fact" as claimed in the Brief of the Solicitor General at the pages indicated:

p. 4: [The Company] "told the Union to make its own computation of their hourly earnings."

p. 5: "On March 17, receiving no reply, the Union, by telegram, again asked for a conference date."

p. 7: "Clark pointed out that the Company's wage proposal was not an across-the-board increase but was based on incentive earnings."

p. 7: "Botelho . . . indicated Union acceptance of at least six or seven of the 19 provisions of the Company proposal" [at the April 10th meeting].

p. 9: "The Union was told that its 'counter proposals' would have to be submitted to company 'higher ups' for any modification."

p. 10: "Botelho . . . was told Horblit was not available for discussion."

p. 12: "When asked whether he contemplated 'doniking up' the workload, Clark admitted 'he planned to take three jobs and make two out of them.'"

p. 12: "The work assignments and wages of loomfixers had been discussed at the bargaining meetings prior to the strike, but no agreement had been reached." [This is true and the Trial Examiner so found; but the Board *erroneously* found: "Respondent changed the wage rate and workload of loomfixers without consulting the Union." (J. A. 738).]

p. 13: "On Monday, July 6, Powell notified Botelho that the Company . . . would not yield from its original contract offer."

p. 14: "Botelho refused to accept this proposal [regarding replaced strikers] stating he would not 'bargain a working man's rights away.'"

APPENDIX B

The Court below *expressly* rejected as either erroneous or irrelevant the following, which are asserted to be "findings of fact" in the Brief of the Solicitor General at the pages indicated:

p. 4 "As of January and February 1960, the time of the Board hearing herein the Company had not supplied the . . . seniority roster requested in 1958."

p. 4 "A copy of the unilaterally instituted insurance policy was furnished the Union on June 4, 1959, after the Union in bargaining sessions in April and again on June 4 had demanded increased benefits thereunder."

p. 4 "On March 2, 1959, the Union submitted its contract proposal wherein it sought, among other things, increased wages, liberalized vacation benefits, and the institution of paid holidays."

p. 5 "Unlike the expiring agreement, this proposed contract omitted the checkoff of union dues; leaves of absence for union business; the right of the parties, upon mutual consent, to amend the contract; the requirement of notice to the Union of proposed workload changes; the right of the Union to reopen wages; the provision barring discrimination against the Union or its members; and the provision for processing of pending grievances past contract termination. In addition, the Company proposed to lengthen the grievance procedure, remove workload disputes from the regular arbitration procedure, and limit the material to be presented at arbitration hearings. Further, the Company contract proposal would have subjected the Union to civil suits for unauthorized work stoppages; vested the employer with power to determine employee compensation and classification for job retention or layoff;

and, by specifying that all jobs remain temporary until designated permanent by the Company, gave the Company the right to abolish jobs without negotiation and in disregard of earned seniority." [The Petitioner showed all of these interpretations of its counterproposal to be unwarranted and the Court, instead of adopting any of them, found, contrary to the Board, that the counterproposal was not "predictably unacceptable," and that, if either proposal was, it was the Union's. (Pet. 20a.)]

p. 6 "On April 6, although it had not yet presented to the Union a specific wage proposal, the Company posted a notice on the plant bulletin board. It advised the employees that a wage increase would be paid April 27 and expressed the hope that the Union would agree so that there would be no delay of the increase beyond that date."

p. 7 "That afternoon the Company . . . revealed that within the preceding 60 days it had unilaterally changed the duties and wages of the forklift driver."

p. 8 "On April 13, the Company posted a detailed wage schedule on the plant bulletin board. The notice . . . stated that the posted wage scale, which was intended to be put into effect April 27, had been presented to the Union on April 10, and that the Company hoped the Union would agree and not delay the increase."

p. 12 "In June, while the strike was on and negotiations were still underway, . . . the Company unilaterally changed the wages and workloads of loomfixers."